Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL FITZGERALD,
Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the State of Iowa tax the revenue from slot machines at parimutuel racetracks and the revenue from all casino games on riverboats, including slot machines, at different rates without violating the Equal Protection Clause?

PARTIES

Petitioner is Michael Fitzgerald, Treasurer of the State of Iowa, an elected official of the State of Iowa. No corporate disclosure statement is required of Petitioner.

Respondents are the Racing Association of Central Iowa, the Dubuque Racing Association, Ltd., the Iowa West Racing Association and the Iowa Greyhound Association, and are Iowa non-profit corporations.

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LOWER COURT DECISIONS

The Iowa District Court in and for Polk County entered its Ruling on Defendant's Motion to Strike, Defendant's Motion for Summary Judgment, and Plaintiffs' Cross-Motion for Summary Judgment on December 4, 2000, in Case No. CE 36601. (App. 20-41).

On June 12, 2002, the Iowa Supreme Court issued the opinion for which review is sought, *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d 555 (Iowa 2002). (App. 1-19). On August 6, 2002, the Iowa Supreme Court denied the State's Request for Rehearing. The Iowa Supreme Court *sua sponte* amended its decision on September 6, 2002. (App. 44-47).

JURISDICTION OF THE COURT

The Iowa Supreme Court held that a state statute establishing different tax rates for the revenue from slot machines at parimutuel racetracks and for the revenue from all casino games on riverboats, including slot machines, has no rational basis and, therefore, violates the Equal Protection Clause. The Supreme Court's decision constituted a final decision on the issue of the State's liability. The Court remanded the case to the Iowa District Court for a determination of appropriate relief.

There are no other federal issues to be decided in this case and the Iowa Supreme Court's opinion is a final judgment for purposes of this Petition. *See Cox Broadcasting v. Cohn,* 420 U.S. 469, 478-80 (1975). There is no adequate and independent state ground for the holding in this case. *See Michigan v. Long*, 463 U.S. 1032 (1983).

The State's petition for rehearing was denied on August 6, 2002.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution, Amendment 14, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Iowa Constitution, Article I, Section 6.

> All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

III. 42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

IV. Iowa Code § 99F.11

> A tax is imposed on the adjusted gross receipts received annually from gambling games authorized by the chapter at a rate of five percent on the first one million dollars of adjusted gross receipts, at a rate of ten percent on the next two million dollars of adjusted gross receipts, and at a rate of twenty percent on any amount of adjusted gross receipts over three million dollars. However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent. The taxes imposed by this section shall be paid by the licensee to the treasurer of the state within ten days after the close of the day when the wagers were made and shall be distributed as follows. . . .

STATEMENT OF THE CASE

In this action three Iowa racetracks sued the Treasurer of the State of Iowa pursuant to 42 U.S.C. §§ 1983 and 1988, the Fourteenth Amendment to the United States Constitution and Article I, § 6[1] and Article III, § 30[2] of the Iowa Constitution challenging the constitutionality of a portion of the State's wagering tax. The racetracks sought injunctive relief against the state tax statute establishing the wagering tax rate and sought a refund of all wagering taxes paid from 1997 which were higher than the wagering taxes paid by riverboats – more than 100 million dollars. (App. 48-51). The Iowa Supreme Court resolved this case under the Equal Protection Clause of the United States Constitution and the Iowa Constitution[3] but did not decide this case on an independent state ground. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 562. The Defendant seeks certiorari because the decision establishes a new Equal Protection standard that conflicts with Supreme Court precedent and will subject the State to challenges of other tax classifications, as well as claims of more than $100 million in refunds in this case.

[1] Article I, § 6, is the state constitutional analog to the Equal Protection Clause of the United States Constitution.

[2] Article III, § 30, of the Iowa Constitution prohibits local or special laws.

[3] Although the Equal Protection and the Fourteenth Amendment claims apply the same standard and would have been decided in the same manner, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n. 12 (1981), the Iowa Supreme Court decided the case only under the Equal Protection Clause. *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d at 562.

Federal and State Equal Protection Clauses: Interwoven Law

The Iowa Supreme Court based its decision on a unified analysis of the Equal Protection Clause under the federal and state constitutions. The decision is not based on adequate and independent state ground which would deprive this Court of jurisdiction. In assessing whether adequate and independent state ground exists, this Court assumes "there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Michigan v. Long*, 463 U.S. at 1042. Under these circumstances this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so." *Id.* at 1040-41.

Nothing in the current decision departs from this stance. The Iowa Supreme Court reiterated that it would apply the "same analysis"[4] in considering the federal and

[4] The Iowa Supreme Court has repeatedly applied the same analysis to decide constitutional issues under the Equal Protection Clause of both the federal and state constitution. *See, e.g., Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002) ("We usually deem the federal and state equal protection clauses to be identical in scope, import, and purpose. We therefore apply the same analysis in considering state equal protection claims as we do in considering federal equal protection claims under the Fourteenth Amendment to the Federal Constitution." (citation omitted)); *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Products, Inc.*, 522 N.W.2d 607, 614 (Iowa 1994) ("In equal protection challenges based on the federal and Iowa Constitutions, we usually interpret both federal and state equal protection provisions the same."); *Rudolph v. Iowa*

(Continued on following page)

state Equal Protection claims. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 558. When making the pivotal assessment whether a rational basis supports the statute the Court relied on federal, not state, case law. *Id.* at 560-61. The holding that the statute violates both federal and state Equal Protection Clauses is stated without any analytical distinction between the two constitutional provisions. *Id.* at 562. This holding does not present a jurisdictional barrier for this Court.

Taxation of Gambling Games at Racetracks and on Riverboats

Parimutuel wagering at racetracks and casino gambling at riverboats originated from separate legislative acts for distinct purposes and thus had distinct and contrasting histories. Parimutuel wagering on horse and dog races was first authorized in Iowa in 1983. (App. 59). The purpose of the racetrack legislation was, in part, to promote the development of agricultural industries. (App. 67). At the time, betting on horse and dog races was the only gambling permitted at racetracks. (App. 59).

In contrast, casino gambling on riverboats was first authorized by the legislature in Iowa in 1989. (App. 62). The riverboat gambling statute permitted traditional forms of casino-style gambling to be conducted on riverboats in such a fashion so as to replicate Iowa's riverboat

Methodist Medical Center, 293 N.W.2d 550, 557 (Iowa 1980) ("We apply the same test under the federal and state constitutions.").

heritage and promote development in Iowa river communities along the historic Mississippi and Missouri Rivers. (App. 63, 67).

Prior to 1994, Iowa had adopted two separate wagering tax statutes: one for the revenue from parimutuel wagering at racetracks and one for the revenue from casino games on riverboats. *See* Iowa Code §§ 99D.15, 99F.11. The highest wagering tax on the revenue from gambling on horse or dog races was 6 percent. *See* Iowa Code § 99D.15 (2001).[5] The highest wagering tax on the revenue from gambling at riverboat casinos was 20 percent. Iowa Code § 99F.11 (2001).[6] All forms of gambling, e.g. slot machines, blackjack, craps, roulette, on riverboats were taxed at the same rate.

By 1994, both industries had encountered economic difficulties, albeit for different reasons. The Iowa riverboat casino industry faced competition from other states because Iowa imposed strict betting limits of $5.00 per bet, and loss limits of $200.00 per person per riverboat "excursion" which other states did not impose. Iowa Code §§ 99F.9(2), 99F.9(7) (1993). As a result of the strict statutory scheme, Iowa lost three of six riverboat businesses to other states with more favorable laws. (App. 65-66).

In 1994, in response to the problems faced by each industry and a lengthy gambling study commissioned by Iowa's Governor, the legislature adopted a number of amendments to the parimutuel racing and riverboat

[5] The parimutuel waging tax has not changed since 1994.

[6] The wagering tax provision for riverboat casinos has not significantly changed since 1994.

casino statutes. To benefit the riverboat industry, the legislature rescinded betting and loss limits and eliminated other restrictions. 1994 Iowa Acts ch. 1021. To benefit the racetrack industry, the legislature authorized the racetracks to operate slot machines to raise additional revenue.[7] This amendment was particularly significant because, at that time, Iowa was the only state in the country that permitted slot machines at racetracks.

At the same time, the legislature set a wagering tax rate on the revenue from the gambling games at the racetracks. *See* Iowa Code § 99F.11. Iowa law created a graduated tax rate on adjusted gross receipts over three million dollars which began at 20 percent in 1994. In 1997 the tax rate increased by 2 percent per year and would have reached 36 percent in 2004. *Id.* During the same period from 1997 to 2004, the tax rate on gambling games on riverboats has been and would have remained at 20 percent. Significantly, the legislature did not amend other tax laws which benefitted only the racetracks.[8]

Proceedings in the Iowa Courts

On December 4, 2000, the District Court dismissed the action in its entirety pursuant to the State's motion for summary judgment. (App. 40). The District Court applied

[7] The legislature did not grant racetracks the authority to operate table gambling games, such as blackjack or craps, or video games of chance. Iowa Code §§ 99F.4A, 99F.1(9) (2001).

[8] Iowa statutes, for example, provide horse racetracks (but not riverboats) with a tax credit of up to five percent of the gross sum wagered per year to be used for debt retirement or operating expenses. Iowa Code § 99D.15(2) (2001).

United States Supreme Court precedent and found at least three conceivable rational bases for the different tax rates: 1) the legislature wanted to promote development of river communities, 2) the legislature wanted to promote Iowa's riverboat history, and 3) the legislature deemed riverboat casinos to be a needed or useful industry. (App. 34).

The Iowa Supreme Court, in a 4-3 decision, reversed the District Court and declared the tax unconstitutional pursuant to the Equal Protection Clause. (App. 15-16). Departing from well established legal precedent, the Iowa Court first made the erroneous conclusion that the sole reason behind the 1994 amendments was to financially benefit the racetracks. (App. 10-11, 13-14). The Court then dismissed each conceivable rational basis behind the tax provision, because the Court found that they were not the real reason behind the amendments. (App. 14-15). Recasting the rational basis test, the Iowa Court further held that the higher tax does not serve the purpose of the 1994 amendments to financially benefit the racetracks. (App. 13-14). The Iowa Court erroneously considered facts that arose several years after the adoption of the statute to justify its findings regarding legislative intent and the impact that the tax would have on the racetracks. (App. 8-9, 12-13).

The three justices in the dissent found a number of rational bases behind the distinction between the wagering tax rates. (App. 17-19). As stated in the dissent, "[r]iverboats are not the same as racetracks" – one speaks to "river lore" while the other speaks to agriculture. (App. 18). The dissent followed this Court's precedent and concluded:

> we might think that the tracks should enjoy a more competitive playing field or that gambling is a bad idea all the way around. But our views on the matter are irrelevant. Our concern is limited to finding a rational basis for the taxing scheme that passes constitutional muster.

(App. 18-19).

Adverse Impact of the State Supreme Court Decision

The decision by the Iowa Supreme Court will have an enormous impact in Iowa both financially and in future litigation. The State is faced with over $100 million dollars in tax refunds to the three racetracks during difficult fiscal times. Misplaced emphasis on fact finding in the Court's decision will reshape the manner in which constitutional claims are litigated in Iowa. Already, one Iowa district court has applied the decision to reject a motion to dismiss a challenge to the State's local option sales tax statute under the Equal Protection Clause apparently because the challenge should be measured by evidence rather than rational speculation. *See Coalition for a Common Cents Solution v. State*, No. EQCV26737 (October 8, 2002) ("[T]he statute does not set out the legislative basis for the local option sales tax. It would be pure speculation on the part of this Court to make such a determination at this stage in the proceedings."). (App. 75-76). A successful challenge to the local option sales tax statute would create serious impediments to Iowa's system of taxation to support school infrastructure projects. (*See* App. 72). Review of the Iowa Supreme Court's decision by this Court is critical to restoration of the rational basis test and to prevent further damage to Iowa's tax system.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

THE IOWA SUPREME COURT INTERPRETED THE EQUAL PROTECTION CLAUSE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT AND THAT WILL CAUSE THE STATE OF IOWA IRREPARABLE DAMAGE AS PRECEDENT IN FUTURE CASES.

In a 4-3 split decision the Iowa Supreme Court struck down a state tax statute under the Equal Protection Clause and directed that the Iowa General Assembly "must tax racetracks and riverboats equally at a rate they both can bear." *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d at 562. (App. 14). The Court dismissed all conceivable rational bases that support the tax statute and relied on fact finding to substitute the Court's judgment for the legislative determination that revenue from slot machines at racetracks and revenues from all casino games on riverboats should be taxed at a different rate. The Equal Protection standard announced by the Court deviates from established legal precedent thereby creating compelling grounds to grant this Petition for Certiorari.

A. Equal Protection analysis required the Iowa Supreme Court to uphold the statute if there were any conceivable rational basis to support different tax rates.

Precedent from this Court clearly establishes that the Equal Protection Clause "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose

or rationale supporting its classification . . ." but only that ". . . a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Indeed, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The rational basis test is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.*

This Court has "repeatedly held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Central State University v. American Association of University Professors,* 526 U.S. 124, 127-28 (1999). When crafting tax statutes in particular, the States have "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger v. Hahn*, 505 U.S. at 11, *quoting from Williams v. Vermont*, 472 U.S. 14, 22 (1985). "Time and again . . . this Court has made clear in the rational-basis context that the 'Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Nordlinger v. Hahn*, 505 U.S. at 17-18, *quoting from Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted).

Despite the plain instruction these cases provide for analysis of statutes under the Equal Protection Clause,

the Iowa Supreme Court flatly rejected the rational basis the district court relied upon,[9] rejected the rational basis argued by the State[10] and declined to apply rational speculation to establish a basis for the tax differential. The Court swept aside any further considerations without explanation save only that "[t]he State made other contentions not accepted by the trial court. We likewise find them unconvincing." *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 562. (App. 14).

Nordlinger

The Iowa Supreme Court's summary rejection of a rational basis to sustain the wagering tax statute stands in stark conflict with the Equal Protection analysis of state tax laws undertaken by this Court in *Nordlinger v. Hahn*. When a property tax system created disparity between newer and older property owners due to the basis on which their property was assessed which resulted in older owners paying progressively less in property taxes than newer owners of comparable property, this Court had "no difficulty in ascertaining at least two rational or reasonable considerations" to support the difference. Neighborhood preservation and protection of a reliance

[9] The district court concluded that promoting development of river towns, or fostering riverboats in order to preserve riverboat history, or promoting riverboats as a useful industry would constitute a legitimate state interest to support the higher tax on revenue from casino games on riverboats. (App. 34).

[10] The State argued, *inter alia*, that a lower tax rate on revenue from casino games on riverboats could prevent boats from leaving the State or could offset higher expenses for operating a riverboat as opposed to operating a racetrack. (App. 54-55).

interest among older property owners were sufficient to satisfy the Equal Protection Clause. *Id.* at 11-13. When analyzing the Iowa tax statute, the Iowa Supreme Court, by contrast, failed to engage in rational speculation and relied on fact finding to evaluate the legislative purpose behind the statute in order to substitute its own judgment for that of the legislature.

B. The Iowa Supreme Court's fact finding regarding the legislative purpose and the financial impact of the tax on racetracks is directly contrary to this Court's precedent and will result in extensive fact finding trials in equal protection cases.

An analysis of state statutes under the Equal Protection Clause is no occasion for fact finding. The law is well-settled that a legislature is not required "to articulate reasons for enacting a statute" and, therefore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis. In other words, a Legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (citations omitted). "Only by faithful adherence to this guiding principle . . . is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen v. Lake Short Auto Parts*, 410 U.S. 356, 365 (1973).

Central State University

This Court has summarily reversed a state supreme court for such factual forays into the record. In *Central State University v. American Association of University Professors*, 526 U.S. 124 (1999), this Court summarily reversed a decision of the Ohio Supreme Court that established a standard conflicting with the rational basis test set by the United States Supreme Court. The Ohio Court, like the Iowa Court in this case, had erroneously looked to evidence in the record to determine whether a statute was supported by a rational basis. *See Id.* 526 U.S. at 126-127.

Like the Ohio Supreme Court in *Central State University,* the Iowa Supreme Court disregarded the prohibition against courtroom fact finding under a rational basis test. The Court makes factual findings regarding: a) the amount of money the racetracks and riverboats have made from slot machines; b) the proportion of money each made from slot machines versus other sources of income; c) the amount of tax that the tracks are expected to pay in future years; and d) the amount of charitable distributions made by the racetracks. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 559-61. (App. 8-13).

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Rational Basis as a Factual Foray

The Iowa Court impermissibly draws factual conclusions regarding the harm that the wagering tax causes the racetracks.

- the tax rates give "riverboats a competitive advantage over racetracks." *Id.* at 561 (App. 12);

– the tax "makes it difficult, if not impossible, for the racetracks to continue to make societal contributions." *Id.* (App. 12);

– the "taxing scheme frustrates the racetracks' ability to contribute to the overall economy of this state." *Id.* (App. 13);

– the rates "will seriously jeopardize the racetracks' viability." *Id.* (App. 13);

– the "tax frustrates the legislative purpose in permitting racetracks to operate." *Id.* at 562 (App. 15);

– the tax rates are "disabling an industry it was allegedly designed to aid." *Id.* (App. 15).

Particularly troubling is the Iowa Court's reliance on facts that occurred *after* the statute was enacted in 1994. The Court makes findings regarding the adjusted gross revenue of both racetracks and riverboats in 1998 through 1999. *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d at 559. (App. 8, 9, 12). The Court makes findings regarding the amount of taxes the tracks will pay in 1999-2002. *Id.* at 560-61. (App. 12). The Court makes findings as to the amount of charitable payments the horse racetrack will be able to make in 2003. (App. 12-13). This financial data – facts not known nor foreseeable by the legislature when it adopted the amendments to the tax statute in 1994 – are not relevant to whether there is a rational basis for taxing revenue from gambling games at racetracks and riverboats at different rates.

The Iowa Court simply substituted its own judgment for the legislative policy decision to tax the revenue from slot machines at racetracks higher than the revenue of casino games on riverboats. However, a legislature has

never been required to submit evidence in a courtroom setting to prove its judgment was ultimately correct. *See Vance v. Bradley*, 440 U.S. 93, 111 (1979). As this Court has stated, the "problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Heller v. Doe*, 509 U.S. at 320, *quoting from Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913).

The Iowa Supreme Court's use of post-legislative facts raises a disturbing question that flies in the face of all United States Supreme Court precedent: Can a constitutional statute become unconstitutional based on facts that occur after its passage? If the present case had been filed and litigated in 1995, many of the court's underlying factual findings would not exist, thus eliminating the Iowa Court's justification for finding the statute unconstitutional. Would the Iowa Supreme Court then find the statute constitutional? The constitutionality of a statute should not turn on events occurring over the passage of time.

The Iowa Supreme Court's decision will turn Equal Protection issues from matters decided on motions into full-blown trials and will create a new standard that is directly contrary to the standards set forth by this Court. *See Vance*, 440 U.S. at 111. The decision sets the parties on an evidentiary track requiring the parties to come out of the gate putting on post-enactment evidence to show the eventual impact of a law.

Iowa is already seeing the repercussions of this decision as it is applied by the district courts in other cases. In *Coalition for a Common Cents Solution v. State*, No. EQCV26737 (October 8, 2002), the District Court cited to this decision in determining that it could not speculate

as to the legislative bases for the statute. (App. 71-76). Of course, under the Supreme Court's rational basis analysis, that is precisely what the District Court must do.

Judicial Oversight: Second Guessing Legislative Tax Policy

The Iowa Supreme Court opinion abandoned the Supreme Court's rational basis test by relying heavily on the adverse impact of the tax on the racetracks and by focusing on the source of the revenue subject to taxation. The rational basis analysis does not empower the judiciary to sit as a "superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas which neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (*per curiam*). Courts must not pass on the reasonableness of a tax by assessing its impact on a particular business. *City of Pittsburgh v. Alco Parking Corp. et al.*, 417 U.S. 369 (1974). This is true even when the impact of a tax may be to destroy a particular business. *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *see also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 358 (1973).

Contrary to established precedent, the Iowa Supreme Court ultimately made a policy decision that the wagering tax statute must be struck because of the impact of the tax rate on racetracks. For example, the Iowa Court stated that "[i]f the legislature wants to increase state revenue, then it must tax racetracks and riverboats equally at a rate they can both bear." (App. 14). Until now, the traditional rational basis standard has never included judicial directives to the legislature on setting tax rates.

The Iowa Supreme Court strayed into concerns that are matters of legislative, not judicial, prerogative. For example, the Court found that the tax rate "frustrates the racetrack's responsibility to distribute money to local government and charitable organizations" and "frustrates the racetrack's ability to contribute to the overall economy of this state" and may end up "helping the riverboat industry" by hurting the racetrack industry. (App. 12, 13, 14). Yet the legislature could set the tax rate on racetracks and riverboats equally at 30, 40 or even 50 percent and not remedy the concerns expressed by the Court.

The Iowa Supreme Court also deviates from this Court's rational basis test by focusing on the activity rather than the taxpayer. The Court found that:

> in reality the essence of the differential treatment is not rooted in the dissimilar scenery surrounding the main activity at both facilities. Rather, the heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 558-59. (App. 8).

The Iowa Supreme Court's focus on the activity as opposed to the taxpayer will unduly complicate the rational basis test analysis by requiring a "look back" at every sales transaction. For example, corn grown, harvested and sold by a family farmer may be taxed differently than corn grown, harvested and sold by a corporation. *See, e.g., Lehnhausen*, 410 U.S. at 360 (taxing personal property held by corporations but not personal

property held by individuals). Likewise, hamburgers may be prepared and sold at state and county fairs in the same manner that McDonald's prepares and sells hamburgers, yet the two enterprises are taxed differently. Even the Iowa Supreme Court has previously found that a sales tax may be imposed upon news-oriented magazines, but not newspapers, without violating Equal Protection. *Hearst Corp. v. Iowa Dep't of Revenue and Finance,* 461 N.W.2d 295, 306 (Iowa 1990), *cert. denied,* 499 U.S. 983, 111 S. Ct. 1639, 113 L. Ed. 2d 735 (1991).

The Iowa Supreme Court has turned away from the rational basis test and thrust the Court into the position of adjudicating tax policy. This Court should grant this petition, as it did in *Central State University*, and reverse the Iowa Supreme Court consistent with United States Supreme Court precedent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 54/01-0011

Filed June 12, 2002

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Appellants,

vs.

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA

Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Opponents of a tax on racetracks appeal the district court's order granting summary judgment to the Treasurer of the State of Iowa on their constitutional equal protection claim, and the State cross-appeals on the court's denial of its motion for summary judgment. **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Mark McCormick, Thomas L. Flynn, and Edward M. Mansfield of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellant Racing Association of Central Iowa.

Gerald Crawford and Brad Schroeder of The Crawford Law Firm, Des Moines, for appellant Iowa Greyhound Association.

Stephen C. Krumpe of O'Connor & Thomas, P.C., Dubuque, for appellant Dubuque Racing Association, Inc.

Lawrence P. McLellan of Sullivan & Ward, P.C., Des Moines, for appellant Iowa West Racing Association.

Thomas J. Miller, Attorney General, and Jeffrey D. Farrell and Jean M. Davis, Assistant Attorneys General, for appellee.

STREIT, Justice.

Iowa racetracks challenge legislation that significantly increased the tax on racetracks, but not on riverboats. The district court upheld the unequal taxing scheme finding the state has a legitimate interest in promoting the riverboat industry and the economy of river towns. Because we find no rational basis exists for this differential tax treatment, we reverse and remand.

I. Background and Facts

The Racing Association of Central Iowa operates Prairie Meadows Racetrack and Casino in Altoona, Iowa. Dubuque Racing Association and Iowa West Racing Association operate racetracks in Dubuque and Council Bluffs, Iowa, respectively. Iowa Greyhound Association is an organization of greyhound owners that races at Dubuque Greyhound Park in Dubuque and at Bluffs Run in Council

Bluffs.[1] The Racetracks sued the Treasurer of the State of Iowa (the "State"), asserting the wagering tax rate on racetracks is a violation of their equal protection rights under both the Federal Constitution and the Iowa Constitution.

Iowa authorizes two types of gambling establishments. Appellants are members of the first class of establishment – the racetrack – and are authorized by statute to conduct two types of gambling. They may engage in wagering on dog or horse races pursuant to Iowa Code section 99D.11 (1999). Racetracks accept wagers on live races at the track or on simultaneous telecast races approved by the Iowa Racing and Gaming Commission. Racetracks may operate slot machines, but they may not operate other games of chance or video machines. Iowa Code § 99F.1(9).

The second type of gambling establishment is excursion gambling boats ("riverboats"). Riverboats may not offer wagering on dog or horse races, but may offer a larger variety of other gambling games, including table games, video machines, and slots. *Id.*

The issue in this case centers around the differential tax rate based on gross receipts generated at racetracks and riverboats. In 1994, the Iowa legislature enacted legislation designed to alleviate the stress put on the Iowa riverboat and racetrack industries, as both were losing significant revenue. This legislation permitted racetracks to operate slot machines and eliminated the wager and

[1] All of the plaintiffs shall be referred to hereinafter as the "Racetracks."

loss limits to assist in increasing revenue. Iowa Code §§ 99F.4A, 99F.2. Finally, the legislature adopted a higher wagering tax rate on racetracks. Iowa Code § 99F.11(1).

> The riverboats are taxed
>
> > at the rate of five percent on the first one million dollars of adjusted gross receipts, at the rate of ten percent on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent on any amount of adjusted gross receipts over three million dollars.

Id. § 99F.11. The tax rate for racetracks is considerably higher than for riverboats.[2] Beginning on January 1, 1997, the legislature set a rate of twenty-two percent on adjusted gross receipts over three million dollars from gambling games at racetracks. *Id.* This rate was set to increase by two percent each calendar year until the rate reaches thirty-six percent. *Id.* Racetracks are currently being taxed at thirty-two percent.

The Racetracks filed a petition in equity challenging the constitutionality of the differential tax imposed on racetracks. Specifically, they argue the taxing statute violates the equal protection clauses of the state the federal constitutions. The State filed a motion for summary judgment and the Racetracks filed a cross-motion for summary judgment. The district court denied the Racetracks' cross-motion for summary judgment concluding

[2] A state representative from a riverboat county offered the original proposed amendment, H-5391 which proposed a forty percent gross-receipts tax on gambling games at racetracks. There was no stated reason for imposing the higher tax rate on racetracks.

they failed to negate every conceivable basis for upholding the taxing statute. Because the court found a rational basis upon which to uphold the constitutionality of the statute, it granted this part of the State's motion for summary judgment. However, it denied the State's motion asserting the court did not have authority to grant injunctive relief because it is not vested with power to determine the appropriate tax rate. The Racetracks appeal and the State cross-appeals on these adverse rulings.

II. Scope of Review

We review the grant or denial of a motion for summary judgment for correction of errors at law. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2002) (citations omitted). Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3) (2002). The party moving for summary judgment must show no genuine issues of material fact exist. *Wright v. Am. Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999). We will view the record in the light most favorable to the non-moving party. *Kelly v. Iowa Mut. Auto. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2000).

III. The Merits

The Racetracks argue the trial court erred in holding the tax statute was constitutional. They argue the justifications given by the State and the district court in support of the statute do not satisfy the rational basis test. The State responds arguing racetracks and riverboats are

dissimilar classes of activities which may be treated differently. However, if we find they are members of the same class, the State contends there is a legitimate state interest in treating racetracks differently than riverboats. In any event, the State argues the court is without authority to set the tax rate so it may not grant injunctive relief. We address each of these arguments in turn.

A. Constitutionality of the Tax Statute

The Racetracks argue the thirty-six percent tax imposed in Iowa Code section 99F.11 is unique, discriminatory, and confiscatory. In so arguing, the Racetracks cite the Equal Protection Clauses of both the federal and state constitutions. Before we begin our analysis of this issue, we briefly address the significance of invoking both the state and federal constitutions.

The federal Equal Protection Clause prohibits states from "deny[ing] . . . any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, §1. The state Equal Protection Clause prohibits laws that "grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. We have said Iowa courts are to "apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim." *In re Morrow,* 616 N.W.2d 544, 547 (Iowa 2000) (quoting *State v. Ceaser,* 585 N.W.2d 192, 196 (Iowa 1998)). With this principle in mind, we turn to the Racetracks' equal protection argument.

We begin our discussion with the presumption Iowa Code section 99F.11 is constitutional. *State v. Keene,* 629 N.W.2d 360, 364 (Iowa 2001). The Racetracks have a

heavy burden of proving beyond a reasonable doubt the statute is unconstitutional. *Id.* Specifically to overcome the presumption of legislative constitutionality, they must negate every reasonable basis upon which to uphold the statute. *Id.* We have said before the legislature acts with broad authority in the realm of taxation. *Hearst Corp. v. Iowa Dep't of Revenue & Fin.,* 461 N.W.2d 295, 305 (Iowa 1990). Despite this broad authority, rational basis review of a taxing scheme is not tantamount to no judicial review. Even in the area of taxation, the legislature must not act in a wholly arbitrary manner in classifying persons or otherwise engage in invidious discrimination. *Great Atl. & Pac. Tea Co. v. Valentine,* 12 F.Supp. 760, 765 (S.D.Iowa 1935); *Fed. Land Bank of Omaha v. Arnold,* 426 N.W.2d 153, 156 (Iowa 1988).

1. Are Racetracks and Riverboats Similarly Situated?

The first step in our constitutional analysis is to determine whether racetracks and riverboats are similarly situated plaintiffs singled out for differential treatment. The State suggests racetracks and riverboats are not within the same class of activities for purposes of equal protection. We disagree. While it is true some differences exist between the two gaming facilities, a "'mere difference is not enough.' It must be relevant or pertinent as well as rational." *Deadwood, Inc. v. North Carolina Dep't of Revenue,* 557 S.E.2d 596, 599 (N.C. Ct. App. 2001) (citation omitted). Here, the State does nothing more than cite to mere differences. *See, e.g., Bierkamp v. Rogers,* 293 N.W.2d 577, 585 (Iowa 1980) (where passengers of automobiles were treated differently than passengers in other

conveyances, the court found a violation of equal protection); *Gleason v. City of Davenport*, 275 N.W.2d 431, 435 (Iowa 1979) (though not the same, the court found an equal protection violation where charter cities were treated differently than other cities because no "special or unique needs" of charter cities justified the differential treatment). We find none of the differences sufficiently compelling to find racetracks and riverboats are not of the same class.

The State contends riverboats and racetracks are different classes simply because one is land-based whereas the other floats on water. At first blush, this is an appealing argument. However, in reality the essence of the differential treatment is not rooted in the dissimilar scenery surrounding the main activity at both facilities. Rather, the heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. Where the same activity is being taxed at significantly different rates, a mere difference in location is not sufficient to uphold the discriminatory tax.

Both facilities exist for the purpose of operating gambling games. The bulk of both entities' revenue is from slot machines. For example, from July 1, 1998 through June 30, 1999, Prairie Meadows' adjusted gross revenue and its slot revenue were identical since the horse tracks have no net revenue. During this same time period, the Miss Marquette riverboat had adjusted gross income of over $32 million, almost $27 million of which came from

slot revenue.[3] If the bulk of their revenue was not based on slot machines, but rather we were called upon to determine whether horse revenue is different from gambling table revenue, our conclusion may be different. However, because most of the entities' revenue is derived from the same source, it is of little consequence that there are other different types of gambling games available at racetracks and riverboats. More importantly, both facilities are authorized to operate within the same gaming industry. Both operate slot machines that are the primary revenue-making vehicle for both facilities. Racetracks and riverboats serve gambling games to the same group of consumers. Both gaming facilities are equally important to the State in terms of revenue production. We conclude racetracks and riverboats are of the same class for purposes of this equal protection challenge. If the taxing statute treats them differently and there is no rational basis for such differential treatment, the statute violates equal protection.

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[3] From July 1, 1998 through June 30, 1999, Bluffs Run's adjusted gross revenue was over $110 million, $109 million of which came from slot revenue; and Dubuque had the same in adjusted gross revenue as it did from slot revenue. In total, all of the Iowa racetracks combined had over $281 million adjusted gross revenue, over $280 million of which came from slot revenue. In comparison, during the same fiscal year, Diamond Jo had over $44 million in adjusted gross revenue, over $36 million of which came from slot revenue; Mississippi Belle II had over $27 million adjusted gross revenue, over $25 million of which came from slot revenue; Catfish Bend had over $28 million adjusted gross revenue, over $23 million of which came from slot revenue; and Belle of Sioux City had over $25 million adjusted gross revenue, almost $19 million of which came from slot revenue. The riverboats had a total of over $513 million adjusted gross revenue, over $418 million of which came from slot revenue.

2. Does the Statute Have a Rational Basis?

Having concluded racetracks and riverboats are similarly situated, we must determine whether the differential tax is rationally related to a legitimate government interest. Equal protection requires the same treatment for similarly situated individuals. *Bowers,* 638 N.W.2d at 689. "'If people are not similarly situated, their dissimilar treatment does not violate equal protection.'" *Id.* (quoting *In re Morrow,* 616 N.W.2d at 548). Since the classification of persons in this case involves neither a suspect class, nor a fundamental right, we need only find the legislature had a rational basis. *Id.* In reviewing an equal protection challenge, we first examine "the legitimacy of the end to be achieved; we then scrutinize the means used to achieve that end." *Arnold,* 426 N.W.2d at 156. To satisfy the rational basis standard, the classification of persons must be reasonable and operate equally upon all within the class. *Id.* The Racetracks can overcome the presumption of constitutionality only by showing the statute is patently arbitrary and bears no rational relationship to a legitimate governmental interest. *Bowers,* 638 N.W.2d at 689.

Overriding this entire issue is the fact that the 1994 legislation was designed to save the racetracks and riverboats from financial distress. The racing industry in Iowa initially saw some success. However, as time passed, the racetracks quickly began to lose significant revenue.[4]

[4] For instance, in 1989 the Waterloo racetrack realized a profit of almost $29 million dollars. However, by 1993, the revenue at this racetrack steeply declined to nearly $13 million. The racetracks at Council Bluffs and Dubuque saw similar fates. Council Bluffs started

(Continued on following page)

Likewise, the riverboats' initial success was soon followed by financial problems stemming from competition from other states. The primary reason the legislature authorized racetracks to operate slots was to provide them with increased revenue. Without revenue from the slot machines, the Racetracks' future was in question.

In determining whether the tax statute is constitutional, we must consider whether the asserted purpose behind this tax could have been the genuine goal of the legislation. *See Nordlinger v. Hahn,* 505 U.S. 1, 15-16, 112 S. Ct. 2326, 2334-35, 120 L. Ed. 2d 1, 15-16 (1992). The very same legislation designed to help the racetracks recover from economic distress also increased the tax on racetrack slots at a rate eighty percent higher than the tax imposed on riverboat slots. Though the State contends the stated purpose behind the racetracks is to encourage economic development and promote agriculture, this differential tax is contrary to such alleged intent. Moreover, any stated benefit from the 1994 legislation is substantially jeopardized by the new tax rate imposed on the racetracks. We "need not in equal protection cases accept at face value assertions of legislative purposes, when . . . the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 1233 n.16, 43 L. Ed. 2d 514, 525 n.16

with an annual revenue of over $105 million but showed an annual revenue in 1993 of little more than $42 million. In 1989, Dubuque's racetrack made over $65 million, but the annual revenue figures in 1993 were just over $7 million. Finally, the racetrack in Altoona began with almost $38 million in revenue, but by the end of 1993 realized only $5 million.

(1975). We now turn to the effect the differential taxing scheme has on both racetracks and riverboats.

Overall, the differential tax treats racetrack slot machines significantly differently than riverboat slot machines despite the fact slots make up the substantial portion of both gaming facilities' revenue. The direct result of the tax is that Racetracks must pay drastically more additional tax than riverboats are required to pay. As the tax rate increases, each of the racetracks has been and will continue to be forced to pay increasingly significant additional tax on gross receipts. For example, if Prairie Meadows' revenue remains the same as it was in 1999, it will pay almost $44 million dollars more in taxes for the years 2000-2002 than it would if it were a riverboat. The Dubuque Racing Association will pay an extra $9 million in taxes and the Iowa West Racing Association is expected to pay an additional $36 million dollars in taxes for these tax years. It is undisputed that because both racetracks and riverboats conduct gambling games, the two facilities are in direct competition. As a result of the differential tax rate, riverboats have a competitive advantage over racetracks.

Because the differential taxing scheme forces racetracks to pay eighty percent more taxes than they would as riverboats, the tax frustrates the racetracks' responsibility to distribute money to local government and charitable organizations. The racetracks are statutorily required to distribute profits "for educational, civic, public, charitable, patriotic, or religious uses." Iowa Code § 99F.6(4)(a). The thirty-six percent tax rate makes it difficult, if not impossible, for the racetracks to continue to make such societal contributions. When the gaming tax reaches thirty-six percent in 2003, many of the racetracks

will have little, if any, profit. Without these grants and charitable gifts, many Iowa communities and charitable organizations will suffer.

Similarly, this taxing scheme frustrates the racetracks' ability to contribute to the overall economy of this state. The racetrack industry is responsible for employing hundreds of Iowans. It also supports the horse industry by distributing millions of dollars to purse supplements. The differential tax takes away the money racetracks need to accomplish these legislatively mandated goals. Overall, the effect of the tax is contrary to the legislative purpose of promoting agriculture and economic development.

A comparable situation is found in the dog-racing industry. The legislature stated the pari-mutuel dog racing industry is designed for "the development and promotion of Iowa greyhound racing dogs in this state." *Id.* § 99F.6(4)(b). The viability of pari-mutuel dog racetracks is completely dependent on slot revenue. A certain percentage of the dog tracks' adjusted gross receipts must be used to supplement purses of live dog races. *Id.* § 99D.12. Given these facts the differential tax scheme frustrates the alleged purposes behind allowing racetracks to operate. Though allegedly the legislation including the differential tax was designed to help the racetracks, eventually the thirty-six percent tax on gross receipts will seriously jeopardize the racetracks' viability.

Given the above facts, the inescapable conclusion is the differential tax is not rationally related to the main purpose of the legislation or to the intent behind authorizing racetracks to operate in this state. The stated purpose was allegedly to save the racetracks from economic distress. There can be no rational reason for this differential

tax, unless the reason for it was to drive the racetracks out of business, thereby helping the riverboat industry. Unless we recognize the desire to discriminately tax one business for the purpose of supporting another similarly situated business as a legitimate government interest, we can find no other basis for upholding this law. When the stated purpose is not true or somehow misleading, we cannot find it was the real reason behind the legislation. If the offered purpose is not the genuine reason supporting the law, it likewise cannot be characterized as a rational reason. In the case before us, because the stated purpose of the legislation is frustrated by the legislation itself, it is impossible to conclude the legislature actually had its alleged purpose in mind when enacting this taxing statute.

The State appears to suggest a reason for the tax is the pure fact that the market will allow it – that the racetracks can bear a higher tax than the riverboats. Even if this is true, it is not a rational basis for upholding the discriminatory tax. Though revenue production may be a legitimate state interest, this goal is not rationally served by a taxing scheme that discriminates against certain slot machines simply because of their geography. "[A] revenue measure based on gross receipts must apply equally to all for the privilege of doing the same act." *Finlayson v. Conner,* 167 So.2d 569, 572 (Fla. 1964); *see also Tweel v. West Virginia Racing Comm'n,* 76 S.E.2d 874, 879 (W. Va. 1953) (statute must apply equally to those of the same class and each member of the class permitted to engage in such business must be treated substantially alike). If the legislature wants to increase state revenue, then it must tax racetracks and riverboats equally at a rate they both can bear.

The State made other contentions not accepted by the trial court. We likewise find them unconvincing. None of the other justifications offered by the State in an effort to support the constitutionality of this tax scheme are rationally related to a legitimate state interest. Each justification ignores the plain fact that this differential tax completely defeats the alleged purpose of the 1994 legislation. The thirty-six percent tax rate does nothing to further the economic viability of the racetracks. Moreover, we are not persuaded that our state riverboat history can only be promoted through such favoritism as taxing racetracks at an eighty percent higher rate than riverboats. The State can make riverboats more competitive with other states without penalizing racetracks through a thirty-six percent tax on gross receipts. At a minimum, the tax frustrates the legislative purpose in permitting racetracks to operate. The legislation goes even further, however, by disabling an industry it was allegedly designed to aid.

In sum, no legitimate reason has ever been offered for the differential tax rate. We can find no rational connection between the discriminatory tax and the alleged intent of promoting riverboat history. The reason for the tax is not that racetracks and riverboats are different. It is not that the two entities operate slightly different types of gambling games. We cannot justify this tax based on the fact racetracks operate on land whereas riverboats operate on water. And the tax is not designed to force the racetracks to make up for past tax breaks. Rather, it appears the purpose behind this discriminatory legislation was simply to allow the state to collect increased revenue from racetrack slots despite the fact they, like the riverboats, derive most of their revenue from slot machines. Where an

additional tax based on gross receipts is imposed on only one member of the same class, purely for tax revenue purposes, the tax violates the federal and state equal protection clauses. *See Volusia County Kennel Club v. Haggard,* 73 So.2d 884, 890 (Fla. 1954). We conclude the tax rate imposed upon the Racetracks is unconstitutional. We reverse and remand.

B. Remedy for Constitutional Violation

The State argues Iowa courts do not have the power to invalidate unconstitutional statutory schemes because this is strictly a legislative function. The district court found this argument to be "wholly without merit." Taken to its logical extreme, the State's argument means the legislature could pass any type of taxing scheme it desires, including unconstitutional ones, because it is immune from judicial review. This outcome is clearly not supported by case law as both state and federal courts have reviewed the constitutionality of particular taxing schemes. *See, e.g., South Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 119 S. Ct. 1180, 143 L. Ed. 2d 258 (1999); *Hearst Corp.,* 461 N.W.2d at 295; *Atchison, Topeka & Sante Fe Ry. v. Blair,* 338 N.W.2d 338 (Iowa 1983). We conclude the district court correctly denied the State's motion for summary judgment on this issue. We affirm.

IV. Conclusion

The fact remains that the Racetracks are burdened with a significant tax which the riverboats are not required to bear. We can find no rational reason for treating racetrack slot machines differently than riverboat slot machines. Because we are obligated to preserve as much of

a statute as possible within constitutional restraints, we only declare unconstitutional that portion of the statute that imposes the discriminatory tax upon racetracks. *See Clark v. Miller,* 503 N.W.2d 422, 425 (Iowa 1993). The second sentence of the first paragraph of Iowa Code section 99F.11 shall be stricken and what remains is the same twenty-two percent tax on gross receipts over three million dollars for both racetracks and riverboats. Because we find the Racetracks satisfied their heavy burden to prove the tax scheme in Iowa Code section 99F.11 is not rationally related to a legitimate state interest, summary judgment should not have been granted. We therefore reverse on the appeal. We also conclude the district court properly denied the State's motion for summary judgment based on the State's assertion the court does not have authority to grant relief in this case. The cross-appeal is therefore affirmed. We remand for determination of appropriate relief.

REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.

All justices concur except Neuman, Carter, and Cady, JJ., who dissent.

#54/01-0011, *Racing Ass'n of Cent. Iowa v. Fitzgerald*

NEUMAN, Justice (dissenting).

I respectfully dissent. One slot machine may be the same as the next. But the legislature was looking at the bigger picture, and so must we.

Under the guise of entertainment and economic development, the State permits gaming corporations to lawfully part their customers from their money. Quite a lot of that money – thankfully – returns to the State in the

form of tax receipts. The question is whether that taxing scheme, which differentiates between gaming on riverboats and gaming at racetracks, bears a rational relationship to a legitimate state interest. I think it does. At least the challengers here have not convinced me beyond a reasonable doubt that it does not.

Riverboats are not the same as racetracks. From an entertainment perspective, they speak to different cultural traditions – river lore versus agriculture. The majority questions these distinctions once gaming is attached to the enterprise. But there is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists. And, rightly or wrongly, a legislative majority could rationally determine that a riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track.

To advance these policy decisions, a reasonable legislature would also want to recognize a very pragmatic distinction between the two gambling venues: riverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere. So it is not unreasonable for the legislature to create economic incentives to develop or retain riverboat gambling while maintaining the status quo with respect to other forms of the sport.

In short, there are a number of rational reasons why the legislature might tax land-based casinos differently from river-based ones. They are different enterprises. We might not agree with the legislature's rationale; we might think the tracks should enjoy a more competitive playing field or that gambling is a bad idea all the way around. But our views on the matter are irrelevant. Our concern is

limited to finding a rational basis for the taxing scheme that passes constitutional muster. Because such a rational basis exists here, I would affirm the district court's rejection of the appellants' constitutional challenge.

Carter and Cady, JJ., join this dissent.

**IN THE IOWA DISTRICT COURT
FOR POLK COUNTY**

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION, **Plaintiffs,** **vs.** **MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,** **Defendant.**	**Case No. CE 36601** **RULING ON DEFENDANT'S MOTION TO STRIKE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 4, 2000)

The above captioned motions came before the Court for hearing on October 11, 2000. Plaintiff Racing Association of Central Iowa was represented by its attorneys, Mark McCormack and Thomas L. Flynn. Plaintiff Dubuque Racing Association, Inc was represented by its attorney Stephen C. Krumpe. Plaintiff Iowa West Racing Association was represented by its attorney Lawrence P. McLellan. Plaintiff Iowa Greyhound Association was represented by its attorney Jerry Crawford. Defendant was represented by its Assistant Attorney General Jean M. Davis. Following oral argument and upon review of the court file, the Court enters the following Ruling.

RULING

I. STATEMENT OF THE FACTS

Plaintiff Racing Association of Central Iowa (hereafter "RACI") is a nonprofit corporation that operates a pari-mutual racetrack and casino known as Prairie Meadows Racetrack and Casino in Altoona, Iowa, pursuant to Iowa Code chapters 99D and 99F. Plaintiff Dubuque Racing Association, Ltd. (hereafter "DRA") is a nonprofit corporation that operates a pari-mutual racetrack and casino known as a Dubuque Greyhound Park & Casino in Dubuque, Iowa, pursuant to Iowa Code chapters 99D and 99F. Plaintiff Iowa West Racing Association (hereafter "IWRA") is a nonprofit corporation that holds the gaming license and owns the slot machines for Bluffs Run Racetrack and Casino, pari-mutual racetrack and casino in Council Bluffs, Iowa, pursuant to Iowa Code chapter 99D and 99F. Plaintiff Iowa Greyhound Association (hereafter "IGA") is an organization of greyhound owners that race at Dubuque Greyhound Park and Bluffs Run and is the entity selected by the Iowa Racing and Gaming Commission (hereafter "Commission") to receive and distribute greyhound purses supplements. Defendant Michael Fitzgerald is the Treasurer for the State of Iowa.

The Racetrack Plaintiffs[1] are legally authorized to conduct two distinct types of gambling. The first type is pari-mutual wagering on dog or horse races. Iowa Code § 99D.11 (1999). Racetracks may also accept pari-mutual wagering on live races conducted at that track or on

[1] RACI, DRA, and IWRA will be collectively referred to as the "Racetrack Plaintiffs" or the "racetracks."

simultaneous telecast or televised race approved by the Commission. *Id.* Second, the racetracks may operate "gambling games." *Id.* at § 99F.4A(1). "Gambling games" means any game of chance authorized by the Commission. *Id.* at § 99F.1(9). However, while a racetrack may offer slot machines, they may not offer games of chance or video machines. *Id.*

Iowa also authorizes a second type of gambling establishment, namely, excursion gambling boats (hereafter "riverboats"). *Id.* at § 99F.3. Unlike racetracks, riverboats may not offer wagering on dog or horse races but may offer wagering on a larger variety of gambling games. *Id.* at § 99F.1(9). Specifically, as applied to riverboats, "gambling games" is defined to include table games and video machines. *Id.* Similarly to racetracks, riverboats also offer slot machines. *Id.*

The controversy in this case centers around the differential tax rate based on receipts generated from gambling games. In 1994, the Iowa Legislature enacted legislation (H.F. 2179) which (a) legalized slot machines at racetracks, (b) eliminated loss limits at riverboats, and (c) provided for a differential wagering tax on gambling games. Pursuant to the Iowa Code, Iowa riverboats are taxed "at the rate of five percent on the first one million dollars of adjusted gross receipts, at the rate of ten percent on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent on any amount of adjusted gross receipts over three million dollars." *Id.* at § 99F.11. "However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is

thirty-six percent." *Id.* Thus, the adjusted gross receipts from gambling games generated by the racetracks were taxed at the rate of 22% for the 1997 calendar year, 24% for the 1998 calendar year, 26% for the 1999 calendar year, and are currently being taxed at 28% for the 2000 calendar year. This rate will increase each year until 2004 at which time the rate will be 36%.

II. STATEMENT OF THE CASE

On June 25, 1998, Plaintiff RACI filed a Petition in Equity. On June 30, 1998, Plaintiff filed an Amended and Substituted Petition in Equity, alleging equal protection and due process challenges to the constitutionality of the wagering tax rate on pari-mutual racetracks licensed under Iowa Code chapter 99D.[2] Plaintiffs seek relief under 42 U.S.C. §§ 1983, 1988; the Fourteenth Amendment to the United States Constitution; and Article 1 section 6, and Article III, section 30 of the Iowa Constitution, requiring that laws have a general and uniform operation.

On March 27, 2000, Defendant filed a Motion for Summary Judgment. On July 31, 2000, Plaintiffs filed a Cross-Motion for Summary Judgment. On August 7, 2000, Defendant filed a Motion to Strike Portions of Plaintiffs' summary judgment materials. These three motions are the subject of this Ruling and will be discussed in turn.

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[2] As the case progressed, the remaining Plaintiffs joined the case.

III. DEFENDANT'S MOTION TO STRIKE

Within his motion, Defendant seeks to strike Plaintiffs' exhibits 6-10, which Plaintiffs attached to their Motion for Summary Judgment, and all summary judgment materials referencing exhibits 6-10. Specifically, Defendant contends that exhibits 6-10, all affidavits from Iowa legislators, are inadmissible as they are merely opinions of the individual legislators. As support for his argument, Defendant directs the Court to *Willis v. City of Des Moines*, 357 N.W.2d 567 (Iowa 1984).

According to the *Willis* Court, opinions offered by legislators are inadmissible on the subject of legislative intent. *Id.* at 571 (citing *Iowa State Education Ass'n v. Public Employment Relations Bd.*, 269 N.W.2d 446, 448 (Iowa 1978); *Consolidated Freightways Corp. v. Nicholas*, 258 Iowa 115, 122, 137 N.W.2d 900, 905 (1965); *Tennant v. Kuhlemeier*, 142 Iowa 241, 245, 120 N.W. 689, 690 (1909); *State v. Burk*, 88 Iowa 661, 664-65, 56 N.W. 180, 181 (1893)). The Court noted that:

> the opinions of individual legislators, remarks on the passage of an act or the debates accompanying it, or the motives or purposes or individual legislators, or the intention of the draughtsman are too uncertain to be considered in the construction of statutes.

Id. (quoting *Tennant v. Kuhlemeier*, 142 Iowa at 245, 120 N.W. at 690).

However, in ascertaining legislative intent, courts may consider the legislative history of the statute. *Goodell v. Humboldt County*, 575 N.W.2d 486, 500 (Iowa 1998) (citing Iowa Code § 4.6(3)). In line with this precept, Plaintiffs contend that exhibits 6-10 merely set forth

appropriate and relevant evidence to assist the Court in its analysis of the statute involved in the present case. Plaintiffs assert that this evidence is not being presented to the Court to demonstrate the subjective state of mind of the individual legislators; rather, it constitutes an objective report of legislative discussion and events leading to the enactment.

This Court finds that in examining the background of legislation, it may consider affidavits from legislators. *See Miller v. Bair*, 444 N.W.2d 487, 488 (Iowa 1989) (employing affidavit of legislator describing background of legislation). Further, after a thorough review of exhibits 6-10, this Court finds that the legislators' affidavits merely state the factual background to the legislation and not that individual legislator's opinion as to the legislative intent or motive. Because the affidavits are relevant and proper in content, this Court must deny Defendant's Motion to Strike.

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is only appropriate when the entire record before the court shows that no genuine issue of material fact is in dispute "and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c). The record on summary judgment includes the pleadings, depositions, answers to interrogatories, admissions on file, affidavits, and exhibits. *Id.*; *Fischer v. Unipac Serv. Corp.*, 519 N.W.2d 793, 196 (Iowa 1994). The moving party carries the burden of showing no issue of material

fact exists. *Wright v. American Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999).

An issue of fact is "material" to the case when its determination may affect the outcome of the suit, given the applicable governing law. *Baratta v. Polk County Health Services*, 588 N.W.2d 107, 109 (Iowa 1999) (citing *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992)). An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the party resisting the motion for summary judgment. *Id.* (citing *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d at 57). Thus, in determining whether a motion for summary judgment is to be granted, this Court must determine whether "reasonable minds would differ on how the issue should be resolved." *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 813 (Iowa App. 1999) (citing *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996)).

Evidence in the entire record is viewed in the light most favorable to the party resisting the motion for summary judgment. *Shivvers v. Hertz Farm Management, Inc.*, 595 N.W.2d 476, 478-79 (Iowa 1999) (citing *McLain v. State*, 563 N.W.2d 600, 603 (Iowa 1997)). "Every legitimate inference that can be deduced from the evidence should be afforded the nonmoving party." *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 11 (Iowa 1999) (citing *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984)). The resisting party may not merely rely upon the allegations or denials found in the pleading, Iowa R. Civ. P. 237(e), but must, however, "set forth specific facts constituting competent evidence to support a prima facie claim." *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991) (citations omitted). This requirement is necessary "to weed out '[p]aper cases and defenses' in order 'to make

way for litigation which does have something to it.'" *Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997) (quoting *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989)).

In light of these principles, this Court reviews the record made in support and in resistance to the motion to determine whether summary judgment is an appropriate measure. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d at 339.

B. Discussion

In essence, Plaintiffs allege the taxing statute in question violates four constitutional clauses, to wit: the equal protection and due process clauses guaranteed by the United States Constitution and equal protection and due process clauses found within the Iowa Constitution. Thus, this Court's [sic] first must examine the differing clauses.

The federal Due Process Clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. The Iowa Due Process Clause provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa const. art. I, § 9.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits states from "deny[ing] . . . any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, § 1. Similarly, the Iowa Constitution prohibits laws that "grant to any citizen, or class of citizens, privileges or

immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6.

Iowa courts are to "apply the same analysis in considering the state equal protection claim as . . . in considering the federal equal protection claim." *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000) (quoting *State v. Ceaser,* 585 N.W.2d 192, 196 (Iowa 1998)). Directly on point, the Iowa Supreme Court stated:

> Article III, section 30, and Article I, section 6, of our state constitution . . . require the law in question to have a uniform operation throughout the state. The effect of section 1, Fourteenth Amendment to the Constitution of the United States as applied to this case is substantially the same as these uniformity provisions of our own constitution. In general, is [sic] a law does not offend against one constitution it is inoffensive to the other.

Heritage Cablevision v. Marion County Bd. of Supervisors, 436 N.W.2d 37, 38 (Iowa 1989) (quoting *Dickinson v. Porter*, 240 Iowa 393, 400, 35 N.W.2d 66, 71-72 (1949)). Likewise, the Iowa Due Process Clause is deemed to be "identical in scope, import, and purpose" as the federal Due Process Claus. *Exira Community School Dist. v. State*, 512 N.W.2d 787, 792 (Iowa 1994) (*Bruns v. State*, 503 N.W.2d 607, 609-11 (Iowa 1993)).

Returning to the case at hand, the crux of Plaintiffs' argument regarding the constitutionality of the taxing legislation is based upon an equal protection analysis. Plaintiffs' due process claims appear to be aimed at a tax refund should the statute be deemed unconstitutional. *Hagge v. Iowa Dep't of Revenue and Fin.*, 504 N.W.2d 448, 452 (Iowa 1993) (holding that if the state has exacted

taxes from an unconstitutional tax, due process requires the state to afford taxpayers opportunity for postpayment relief) (citations omitted). *See also McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36, 110 S. Ct. 2238, 2250 (1990) (stating that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause"); 71 Am. Jur. 2d *State and Local Taxation* § 110 (1973) (stating that when a taxing statute is unconstitutional, state effectively took property without due process of law). Thus, in regard to Plaintiffs' substantive claim, the issue boils down to whether Iowa Code § 99F.11 violates the protections guaranteed through the Equal Protection Clause.

"Equal protection requires that those who are similarly situated be treated similarly." *Kuta v. Newberg*, 600 N.W.2d 280, 288 (Iowa 1999) (citing *Norland v. Grinnell Mut. Reins. Co.*, 578 N.W.2d 239, 241 (Iowa), cert. denied, 525 U.S. 932, 119 S. Ct. 342, 142 L. Ed.2d 282 (1998)). However, "[a]ll persons need not be treated alike to meet constitutional standards for equal protection." *Iowa Dep't of Transp. v. Iowa Dist. Court for Pottawattamie County*, 592 N.W.2d 41, 43 (Iowa 1999) (citing *State v. Bell*, 572 N.W.2d 910, 912 (Iowa 1997)). The first step in analyzing an equal protection question is to determine the applicable test: strict scrutiny or rational-basis. *State v. Phillips*, 610 N.W.2d 840, 844 (Iowa 2000). "Where, as here, the challenged tax classifications do not adversely affect a fundamental interest and are not based upon suspect criteria, they are tested under the more lenient standard of rationality, traditionally applied in evaluating equal protection challenges to regulation of economic and commercial

matters." *Heritage Cablevision v. Marion County Bd. of Supervisors*, 436 N.W.2d at 38 (citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96, 103 S. Ct. 2296, 2308, 76 L. Ed.2d 497, 513 (1983)).

The Iowa Supreme Court explained the rational-basis test for equal protection challenges as:

> [The challenged classification must be sustained] unless the challenging party can demonstrate that it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. Under the rational basis test, a legislative classification is upheld if any conceivable state of facts reasonably justifies it.

Exira Community School Dist. v. State, 512 N.W.2d 787, 793 (Iowa 1994) (quoting *Kent v. Polk County Bd. of Supervisors*, 391 N.W.2d 220, 224-25 (Iowa 1986) (alteration in original)).

> The general principles applicable to the determination of the constitutionality of the challenged statutory provision are well established. All presumptions are in favor of the constitutionality of the statute and will not be held invalid unless it is clear, plain and palpable that such decision is required. The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. Courts do not pass on the policy, wisdom, advisability or justice of the statute. The remedy of those who contend legislation which is within constitutional bounds is unwise or oppressive is with the legislature. . . . Plaintiffs have the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provision invoked and to point out with particularity the details of the alleged

> invalidity. To sustain the burden plaintiffs must negate every reasonable basis which may support the statute. Every reasonable doubt is resolved in favor of constitutionality. . . . An iron rule equal taxation is neither attainable nor necessary.

Heritage Cablevision v. Marion County Bd. of Supervisors, 436 N.W.2d at 38 (quoting *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa1977)).

"This presumption in favor of constitutionality is especially strong where the statute was enacted to promote a public purpose and relates to taxation." *Kraft v. Department of Revenue and Fin.*, 465 N.W.2d at 667 (citing *Lee Enters., Inc. v. Iowa State Tax Comm'n*, 162 N.W.2d 730, 739 (Iowa 1968)). As the United States Supreme Court said:

> in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily joy [sic] a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against persons or classes.

Madden v. Kentucky, 309 U.S. 83, 88, 60 S. Ct. 406, 408, 84 L. Ed. 590 593 (1940) (citation omitted). *See also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872 (1937) (stating that the Court "has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exception infringe no constitutional limitation"); *Hearst v. Iowa Dept of Revenue and Fin.*, 461 N.W.2d 295, 305 (Iowa

1990) (stating that in matters of taxation, the legislators have the greatest freedom in classification). Thus, "[i]t is widely recognized that the rational basis standard is easily satisfied in challenges to tax statutes." *Heritage Cablevision v. Marion County Bd. of Supervisors*, 436 N.W.2d at 38.

In light of these principles, this Court examines whether Plaintiffs have met their "staggering burden" in demonstrating that Iowa Code § 99F.11 violates the equal protection clauses. Specifically, Plaintiffs must establish beyond a reasonable doubt that there is no legitimate governmental interest in the taxing statute's discriminatory treatment between riverboats and racetracks.

Defendant presents several purportedly rational reasons to tax the two entities differently. In response Plaintiffs attempt to negate each asserted justification. Further, Plaintiffs contend that should they negate the justifications, they must prevail. However, case law does not support Plaintiffs' position. Plaintiffs have the burden to negate every conceivable basis for supporting the statute, not merely those posed by Defendant. As the United States Supreme Court stated, a "State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by the evidence or empirical data.'" *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 3642-43, 125 L. Ed.2d 257 (1993) (internal citations omitted). *See also Iowa Dep't of Transp. v. Iowa Dist. Court for Pottawattamie County*, 592 N.W.2d at 43 (citing *McMahon v. Iowa Dept' of Transp.*, 522 N.W.2d 51, 57 (Iowa 1994)). Further, this Court must make its own inquiry to determine whether "the legislature could

conclude that the classification would promote a legitimate state interest." *Sperfslage v. Ames City Bd. of Review*, 480 N.W.2d at 49 (citations omitted).

The problem this Court finds in respect to Plaintiffs argument is that "it has repeatedly been held and appears to be settled that a statute which encourages the location within the State of needed and useful industries" by discriminatory taxation provisions is not arbitrary and does not violate the Equal Protection Clause of the United States Constitution. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 528, 79 S. Ct. 437, 441 (1959) (citing *Bell's Gap R.R. Co. v. Commonwealth of Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 535, 33 L.Ed. 892 (1890); *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S. Ct. 310, 313, 74 L.Ed. (1930); *Williams v. Mayor and City Counsel of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); *Colgate v. Harvey*, 296 U.S. 404, 439, 56 S. Ct. 252, 263, 80 L. Ed. 299 (1935) (dissenting opinion). *See also Zobel v. Williams*, 457 U.S. 55, 67, 102 S. Ct. 2309, 2317, 72 L. Ed.2d 672 (1982) (Brennan, J., concurring) (stating that state may undertake to advance certain industries within its borders); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60, 93 S. Ct. 1001, 1003-04, 35 L. Ed.2d 351 (1973) (holding that state may impose different tax rate upon different trades, professions, or products). Further, "[t]he legislature may withhold the burden of tax in order to foster what it conceives to be a beneficial enterprise . . . or a depressed industry." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. at 512-13, 57 S. Ct. at 874 (citations omitted). *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271, 104 S. Ct. 3049, 3055, 82 L. Ed.2d 200 (1984) (noting that state may enact laws to promote new industry in state).

As these principles apply to the case at hand, this Court finds the Iowa Legislature has a legitimate interest in promoting development of certain areas within its borders (*e.g.*, river town development). This interest alone may justify the discriminatory tax rate. Additionally, the Iowa Legislature could conclude riverboats foster the beneficial purpose of preserving Iowa's riverboat history. *See* Iowa Code § 99F.7(3) (as a condition of receiving a excursion gambling boat license, the applicant must "develop, and as nearly as practicable, recreate boats that resemble Iowa's riverboat history"). Or simply, the Iowa Legislature could have concluded that river boats should receive a beneficial tax rate because it is a needed or useful industry. In sum, for purposes of the motion before the Court at this time, this Court merely finds that Plaintiffs have failed to meet their burden in establishing that they are entitled to summary judgment as a matter of law.

V. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

As to the standard of review and the underlying legal principles guiding this case, see supra IV.A and B.

In support for its Motion for Summary Judgment, Defendant presents several arguments, to wit, (1) Iowa possesses a legitimate interest in segregating the tax burden between pari-mutual racetracks and excursion gambling boats; (2) Defendant Fitzgerald is not a proper party; (3) Plaintiff cannot recover damages due to the Eleventh Amendment Immunity; and (4) this Court cannot grant injunctive relief because it has no authority to set a tax rate. Each contention will be discussed in turn.

A. Legitimate State Interest

Defendant first forwards the argument that he is entitled to summary judgment because Iowa Code § 99F.11 is reasonably related to a legitimate state interest. Essentially, this argument is the reverse side of Plaintiffs' Motion for Summary Judgment. Instead of asking this Court to conclude that the undisputed facts indicate that there [sic] no legitimate state interest in enacting this discriminatory tax, as Plaintiffs did, Defendant contends that the undisputed facts demonstrate that there is a legitimate state interest as a matter of law. Thus Defendant concludes that this tax does not violate the federal or state constitutions and his Motion for Summary Judgment should be granted.

Because Defendant's motion involves the identical legal principles as set forth in Part IV.B, this Court finds it unnecessary to restate them. This Court does note the unique procedural consequences of Defendant raising his argument via a motion for summary judgment. As this Court noted within its discussion of Plaintiffs' Motion, because Plaintiffs are challenging a statute on constitutional grounds, they bear a staggering burden of proof. *Heritage Cablevision v. Marion County Bd. of Supervisors*, 436 N.W.2d at 38. However, according to the well-settled principles of summary judgment, the moving party bears the burden of proof. Therefore, for purposes of his summary judgment, Defendant would bear the burden of demonstrating that there are no material issues of fact in dispute and that he is entitled to summary judgment as a matter of law. *Jain v. State*, 617 N.W.2d 293, 297 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995). As a final procedural twist to Defendant's motion, this Court has already determined within

Plaintiffs' Motion for Summary Judgment that there exists at least one rational legislative purpose in taxing riverboats and racetracks at different rates.

This Court believes the last fact to be determinative to the issue. This Court has determined that as a matter of law, there exists at least one rational basis to support Iowa Code § 99F.11. *See* supra IV.B. Thus, as a matter of law, the taxing statute passes constitutional scrutiny and Defendant is entitled to judgment. The fact that Defendant failed to raise any of the reasons upon which this Court relied on in reaching its conclusion is of no consequence. According to the rules of statutory review based upon constitutional challenges, the court is to make its own inquiry to determine whether a rational basis exists. *See Sperfslage v. Ames City Bd. of Review*, 480 N.W.2d at 49. For this reason, this Court must conclude that Defendant is entitled to summary judgment.

In the interest of justice, this Court will briefly address Defendant's remaining arguments.

B. Proper Party

Second, Defendant contends that this Court should grant his Motion for Summary Judgment because he is not a proper party. Defendant asserts that under *Hatfield v. Williams*, 376 F. Supp. 212, 214 (N.D.Iowa 1974), to render a state official a proper defendant in a suit to enjoin application of a state statute, the officer must have some connection with the enforcement of the statute. Accordingly, Defendant concludes, because he possesses no authority to enforce the wagering tax, his connection is too insubstantial to render him a proper party.

According to their Amended and Substituted Petition in Equity, Plaintiffs seek to enjoin the collection of the wagering tax on gambling games other than at a uniform rate. In such an action, it appears to this Court as though the Treasurer of the State of Iowa is the appropriate party. *See Carlton v. Grimes*, 237 Iowa 92, 23 N.W.2d 883 (1946) (plaintiffs sought to enjoin the Treasurer of the State from collecting specific tax). Therefore, this Court finds no merit in Defendant's second argument.

C. Eleventh Amendment Immunity

Next Defendant contends that Plaintiffs cannot maintain an action against a state official in his or her official capacity because the Eleventh Amendment bars such actions. Specifically, Defendant contends that because Plaintiffs seek monetary damages from Defendant in his official capacity pursuant to 42 U.S.C. § 1983, and these funds would be payable from the public treasury, Plaintiffs suit is barred by the Eleventh Amendment.

First and foremost, this Court notes that Defendant's argument is only directed towards Plaintiffs' § 1983 claim. In other words, Plaintiffs' claims based upon the United States and Iowa Constitutions are not the subjects of Defendant's Eleventh Amendment argument.

Returning to the issue at hand, § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

> thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The issue then becomes whether Plaintiffs' § 1983 claim from injunctive relief against Defendant should be dismissed pursuant to the Eleventh Amendment. Of particular relevance to this issue, the United State [sic] Supreme Court held "that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal or state court." *Howlett v. Rose*, 496 U.S. 356, 365, 110 S. Ct. 2430, 2437 (1990) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989)). Clearly, at initial glance, it appears as though Plaintiffs may not being [sic] a § 1983 suit against Defendant because of the Eleventh Amendment immunity.

However, Plaintiffs direct this Court to the *Will* decision which provides in part:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State."

Will v. Michigan Dep't of State Police, 491 U.S. at 71 n.10, 109 S. Ct. at 2312 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14 (1985); *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 453-54 (1908)). Therefore, Plaintiff [sic] argue that according to these Supreme Court decisions, the Eleventh Amendment is not applicable to claims for injunctive relief against a state official.

After a thorough consideration of this issue, this Court finds that Defendant has failed to meet his burden in establishing that he is entitled to summary judgment based upon the Eleventh Amendment. This Court is not holding that Defendant has no Eleventh Amendment immunity as a matter of law; rather, this Court merely concludes that Defendant failed to meet its burden in proving the applicability.

D. Court's Authority

Finally, Defendant asserts that he is entitled to summary judgment because this Court does not possess the authority to grant Plaintiffs' injunction relief. Namely, Defendant contends that taxation is a legislative function and as such, this Court may not set the rate of taxation. Thus, Defendant contends he is entitled to summary judgment.

This Court finds Defendant's contention to be wholly without merit. According to Defendant's logic, no court could ever address a constitutional challenge to a taxation scheme. Thus, a court could not remedy even the most discriminatory tax (*e.g.*, taxation rate based upon race or sex). Clearly, such a position finds no support in the case law. *See* supra IV.B (noting several cases discussing the

constitutionality of taxation schemes). While this Court may tend to agree that courts should be wary of creating new taxes, this Court not only possesses, but also is duty bound to employ its authority to strike unconstitutional statutes. Therefore, this Court finds that Defendant is not entitled to summary judgment based upon his final argument.

To conclude, this Court finds that Defendant is entitled to summary judgment based upon this Court's conclusion that Iowa Code § 99F.11 is reasonable related to a legitimate state interest. However, this Court finds the remainder of Defendant's arguments to be without merit.

V. ORDER

IT IS THE ORDER OF THE COURT that Defendant's Motion to Strike is DENIED.

IT IS THE FURTHER ORDER OF THE COURT that Plaintiffs' Motion for Summary Judgment is DENIED.

IT IS THE FURTHER ORDER OF THE COURT that Defendant's Motion for Summary Judgment is GRANTED.

SO ORDERED this 4th day of ~~November~~ December, 2000.

/s/ Scott D. Rosenberg
SCOTT D. ROSENBERG,
DISTRICT JUDGE
Fifth Judicial District of Iowa

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IN THE SUPREME COURT OF IOWA

No. 54/01-0011

ORDER

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Appellants,

vs.

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,

Appellee.

(Filed Aug. 6, 2002)

After consideration by the court, the Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 6th day of August, 2002.

THE SUPREME COURT OF IOWA
By /s/ Louis A. Lavorato
Louis A. Lavorato,
Chief Justice

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IN THE SUPREME COURT OF IOWA

No. 54/01-0011

CORRECTION ORDER

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Appellants,

vs.

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,

Appellee.

(Filed Sep. 6, 2002)

In that the court misstated one of the State's contentions was a cross-appeal, pursuant to Iowa Supreme Court Rule 21.26, the opinion in this case, filed June 12, 2002, is corrected as follows:

1. The second paragraph on the cover page, lines 3-5, which read

> constitutional equal protection claim and the State cross-appeals on the court's denial of its motion for summary judgment. **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

is corrected to read as follows:

> constitutional equal protection claim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

2. Page 3, line 6, which read

> rational basis exists for this differential tax treatment, we reverse and remand.

is corrected to read as follows:

> rational basis exists for this differential tax treatment, we affirm in part, reverse in part, and remand.

3. Page 5, lines 7-8, which read

> determine the appropriate tax rate. The Racetracks appeal and the State cross-appeals on these adverse rulings.

is corrected to read as follows:

> determine the appropriate tax rate. The Racetracks appeal.

4. Page 15, line 14, which read

> have been granted. We therefore reverse on the appeal. We also conclude the

is corrected to read as follows:

> have been granted. We therefore reverse. We also conclude the

5. Page 15, lines 17-18, which read

> case. The cross-appeal is therefore affirmed. We remand for determination of

is corrected to read as follows:

> case. We remand for determination of appropriate relief.

6. Page 15, lines 19-20, which read

> **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

is corrected to read as follows:

> **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Corrected pages are attached to this order.

Dated this 6 day of September, 2002.

THE SUPREME COURT OF IOWA
By /s/ Michael J. Streit
Michael J. Streit, Justice

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IN THE IOWA DISTRICT COURT FOR
POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	)	EQUITY NO. 36601 AMENDED AND SUBSTITUTED PETITION IN EQUITY (Filed Jun. 30, 1998)

Plaintiff, Racing Association of Central Iowa (hereinafter "RACI"), for its Amended And Substituted Petition In Equity against Defendant Michael Fitzgerald, Treasurer, State of Iowa, states as follows:

1. RACI is a nonprofit corporation incorporated in and authorized to conduct business in Iowa.

2. RACI has its principal place of business in Polk County, Iowa.

3. Michael Fitzgerald is the Treasurer of the State of Iowa.

4. The Treasurer has the duty to uphold the fiscal laws of the State and as relevant here, receives the wagering tax imposed by Iowa Code § 99F.11.

5. In this action, RACI seeks relief under §§ 1983 and 1988 of Title 42 of the U.S. Code, the Fourteenth Amendment to the U.S. Constitution, and Article I, § 6 and Article III, § 30 of the Iowa Constitution.

6. RACI, pursuant to license and under the name "Prairie Meadows Racetrack and Casino," operates gambling games at a pari-mutuel racetrack enclosure.

7. Under Iowa Code § 99F.11, adjusted gross receipts from gambling games are subject to a wagering tax.

8. The rate of the wagering tax imposed under § 99F.11 is greater for gambling games at racetrack enclosures than for gambling games at non-racetrack enclosures, to-wit: twenty percent (20%) fixed for non-racetrack enclosures versus twenty-two percent (22%) for racetrack enclosures in calendar year 1997, twenty-four percent (24%) for racetrack enclosures in calendar year 1998, and increasing an additional two percent (2%) per year for racetrack enclosures until the rate is thirty-six percent (36%).

9. Accordingly, RACI's adjusted gross receipts from its gambling games are subject to the higher rate of tax.

10. For the 1997 calendar year, the 22% wagering tax paid by RACI required RACI to pay $2,487,185.00 more than it would have paid at 20% if it were a non-racetrack enclosure. For the 1998-2002 calendar years, the additional wagering taxes which RACI will be required to pay as a racetrack enclosure are estimated as follows:

	Projected Wagering Tax Remittance	Rate	If Capped @ 20%	Difference
1998	$30,730,000	24%	$25,650,000	$5,080,000
1999	33,270,000	26%	25,650,000	7,620,000
2000	35,810,000	28%	25,650,000	10,160,000
2001	38,350,000	30%	25,650,000	12,700,000
2022	40,890,000	32%	25,650,000	15,240,000

11. No rational, nonarbitrary reason exists for taxing adjusted gross receipts from gambling games at a higher rate when those games are conducted at racetrack enclosures, rather than elsewhere.

12. Iowa Code § 99F.11, in imposing a higher rate of taxation on RACI's adjusted gross receipts from gambling games, deprives RACI of due process and of the equal protection of the laws, in violation of the Fourteenth Amendment to the U.S. Constitution.

13. Iowa Code § 99F.11 is inconsistent with the requirements of Article I, § 6 and Article III, § 30 of the Iowa Constitution that laws have a general and uniform operation.

14. Iowa Code § 99F.11 must be declared unenforceable, under both the U.S. and Iowa Constitutions, insofar as it imposes a higher rate of wagering tax on gambling games at racetrack enclosures, and any enforcement or collection of the higher rate of tax must be enjoined.

WHEREFORE, RACI respectfully requests that this Court enjoin Defendant Michael Fitzgerald, Treasurer, State of Iowa, from collecting a wagering tax on adjusted gross receipts on gambling games of RACI other than at a uniform rate as to all gambling games of non-racetrack enclosures, that Defendant be required to remit to RACI any such taxes paid since January 1, 1997 which are higher than the wagering taxes paid by non-racetrack enclosures, that RACI be awarded its costs and attorney fees (to the extent allowed by law) for prosecuting this action, and that RACI be and granted

such other relief as is just and equitable under the circumstances.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA Defendant.	**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Filed Mar. 27, 2000)

Defendant Michael Fitzgerald hereby makes the following motion for summary judgment pursuant to Iowa R. Civ. P. 237.

1. This case concerns a constitutional challenge to the manner in which the State of Iowa taxes licensed gambling facilities.

2. Plaintiff Racing Association of Central Iowa (RACI) operates a pari-mutuel racetrack known as Prairie Meadows Racetrack and Casino in Altoona, Iowa, pursuant to Iowa Code chapter 99D. (Petitioner, ¶¶ 2,6). Interveners Dubuque Racing Association, Ltd. (DRA) and Iowa West Racing Association (IWRA) operate racetracks in Dubuque and Council Bluffs, respectively.[1] (*See* DRA Petitioner, ¶ 8; IWRA Petitioner, ¶ 7). Intervener Iowa

[1] RACI, DRA, and IWRA will be collectively referred to as "the racetracks" in this motion.

Greyhound Association (IGA) is an organization of greyhound owners that races at DRA and IWRA. (Exhibit 1, Ketterer affidavit).

3. Plaintiffs[2] complain that the racetracks are taxed unfairly vis-a-vis "excursion gambling boats," which are licensed pursuant to Iowa Code chapter 99F.

4. Equal protection challenges are decided using a traditional rational basis standard unless a classification involves a suspect class or a fundamental right. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Bennette v. City of Redfield*, 446 N.W.2d 467, 473 (Iowa 1989).

5. This case does not require strict scrutiny because it does not involve a suspect class nor a fundamental right. Therefore, the court should apply the rational basis test in this case.

6. Summary judgment is appropriate when the record before the court shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Teleconnect v. U.S. West Communications*, 508 N.W.2d 644, 648 (Iowa 1993).

7. This case is susceptible to a motion for summary judgment; in fact, no evidence is necessary to decide the issue whether the statute has as rational basis. *See Gregory v. Ashcroft*, 898 F.2d at 605 (affirming dismissal of an equal protection claim subject to the rational basis

[2] Because the interveners make the same claims as RACI, they will be collectively referred to as "plaintiffs."

test). A differing classification shall be upheld if "any state of facts reasonably can be conceived to justify it." *Currans v. Linn County Civil Service Comm'n*, 540 N.W.2d 469, 472 (Iowa App. 1995); *Knapp v. Tinder*, 183 F.3d 786, 789 (8th Cir. 1999).

8. Plaintiffs have a "staggering burden" to prove that a statute is unconstitutional. *Heritage Cablevision v. Marion County Bd. of Sup'rs*, 436 N.W.2d 37, 38 (Iowa 1989).

9. It is widely recognized that the rational basis standard is easily satisfied in challenges to tax statutes. *Heritage*, 436 N.W.2d at 38.

10. Beyond the deference given to legislatures to distinguish between classes of businesses in tax cases, legislatures are given further deference in making laws regulating gambling. The gambling industry is distinct from almost all other businesses because gambling is an activity which the states may prohibit altogether. *Kelly v. New Hampshire Pari-Mutuel Comm'n*, 499 A.2d 995, 997 (N.H. 1985). "Licensed gambling is a privilege conferred by the state and does not carry with it the rights inherent in useful trades and occupations." *Thomas v. Bible*, 694 F.Supp. 750, 759 (D. Nev. 1988) *aff'd* 896 F.2d 555 (9th Cir. 1989). Gambling remains an illegal activity in Iowa, except as specifically permitted by statute. *State v. Wilt*, 333 N.W.2d 457, 462 (Iowa 1983).

11. The legislature may have had several rational reasons to have different rates on the wagering tax for pari-mutuel racetracks, including the following:

a. Pari-mutuel racetracks and excursion gambling boats are dissimilar classes of businesses.

b. The legislature has an interest in maximizing tax revenues from gambling facilities.

c. The legislature could have reasonably found that it is necessary to maintain a lower wagering tax rate on excursion gambling boats to prevent them from leaving the state.

d. The legislature could have reasonably found that operating a casino on a boat is inherently more limited and burdensome than operating a land-based facility.

e. The legislature could reasonably believe that the tracks should pay a higher wagering tax on its gambling game operation because they have received considerable tax breaks on their pari-mutuel operation.

12. Plaintiffs other constitutional claims should be rejected for similar reasons. *See Knapp v. Hanson*, 183 F.3d 786, 790 (8th Cir. 1999); *Exira Community School Dist. v. State*, 512 N.W.2d 787, 793 (Iowa 1994).

13. Additionally, Treasurer Fitzgerald should be dismissed from this suit because he has no role in enforcing this statute. *See Hatfield v. Williams*, 376 F.Supp. 212, 214 (N.D.Iowa 1974) (citing *Ex Parte Young*, 209 U.S. 123 (1908).

CONCLUSION

Wherefore, Defendant Michael Fitzgerald requests that the Court grant his motion for summary judgment and dismiss this action in its entirety.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA Defendant.	**DEFENDANT'S STATEMENT OF UNDISPUTED FACTS** (Filed Mar. 27, 2000)

Defendant Michael Fitzgerald, pursuant to Iowa R. Civ. P. 237 hereby sets forth the following statement of undisputed facts in support of his motion for summary judgment.

1. Plaintiff Racing Association of Central Iowa (RACI) operates a pari-mutuel racetrack known as Prairie Meadows Racetrack and casino in Altoona, Iowa, pursuant to Iowa Code chapter 99D. (Petition, ¶¶ 2, 6).

2. Interveners Dubuque Racing Association, Ltd. (DRA) and Iowa West Racing Association (IWRA) operate racetracks in Dubuque and Council Bluffs, respectively.[1] (*See* DRA Petition, ¶ 8; IWRA Petition, ¶ 7).

3. Intervener Iowa Greyhound Association (IGA) is an organization of greyhound owners that races at DRA and IWRA. (Exhibit 1, Ketterer affidavit).

[1] RACI, DRA, and IWRA will be collectively referred to as "the racetracks" in this statement.

4. Plaintiffs[2] complain that the racetracks are taxed unfairly vis-a-vis "excursion gambling boats," which are licensed pursuant to Iowa Code chapter 99F.

5. The authorization and development of the pari-mutuel racetrack and excursion gambling boat industries in Iowa have separate and distinct histories. This history is briefly set forth below.

Pari-mutuel racetracks:

6. Pari-mutuel gambling at racetracks was first authorized in 1983. 1983 Iowa Acts ch. 187. The 1983 legislation authorized qualified nonprofit corporations to apply for licenses to conduct wagering on horse or dog races. Iowa Code § 99D.7; 1983 Iowa Acts ch. 187 § 8. There are no for-profit racetrack licensees in Iowa. (Exhibit 1, Ketterer Affidavit). The only type of wagering permitted was pari-mutuel wagering on the horse or dog races. Iowa Code § 99D.11; 1983 Iowa Acts ch. 187, § 11. No other forms of gambling were permitted at that time. Iowa Code § 99D.2; 1983 Iowa Acts ch. 187, § 3.

7. The 1983 legislation also created the State Racing Commission. 1983 Iowa Acts ch. 187, § 5. The Racing Commission was created to exercise full jurisdiction over and supervise all race meetings governed by Iowa Code chapter 99D. 1983 Iowa Acts ch. 187, § 6. The Racing Commission's duties included investigating applicants for a license to determine who best served the interests of

[2] Because the interveners make the same claims as RACI, they will be collectively referred to as "plaintiffs."

Iowa, adopting standards for race meetings, regulating purse structures, establishing standards for the saliva and urine tests for horses and dogs, establishing fees for saliva and urine testing, prevent animals from racing if in violation of the regulations, withhold purses[3] in disputed races, establishing procedures for hearings regarding challenged races, require licensees to use a computerized totalizator system for calculating odds and payoffs of races, and other duties. 1983 Iowa Acts ch. 187, § 7; *see also* Iowa Code § 99D.7.

8. The Racing Commission began accepting applications for racetracks after the implementation of the 1983 legislation. In July and August of 1984, the Commission granted the following pari-mutuel wagering licenses:

> a) Dubuque Greyhound Association, Ltd., d/b/a Dubuque Greyhound Park in Dubuque. Dubuque Greyhound Park began operations on June 1, 1995.
>
> b) Iowa West Racing Association, d/b/a Bluffs Run in Council Bluffs. Bluffs Run began operations on February 27, 1986.
>
> c) National Cattle Congress, d/b/a Waterloo Greyhound Park in Waterloo. Waterloo Greyhound Park began operations on October 15, 1986.
>
> d) Racing Association of Central Iowa, d/b/a Prairie Meadows in Altoona. Prairie Meadows began its horse racing operations on March 1, 1989.

(Exhibit 2, Commission chronology).

[3] A "purse" is a prize awarded to the place winners of a horse or dog race.

9. The dog racing industry in Iowa initially saw some success. However, as early as 1990, it began to show a significant decline in revenue from pari-mutuel wagering, which is know [sic] as the mutuel handle.[4] The following chart shows the annual mutuel handle at each of the three Iowa dog tracks, from 1989 to 1993:

Year	Waterloo	Council Bluffs	Dubuque
1989	$28,993,917	$105,477,937	$65,165,531
1990	$29,993,917	$77,831,539	$41,219,405
1991	$25,548,278	$66,832,377	$28,179,552
1992	$18,907,332	$57,863,473	$19,867,762
1993	$12,804,286	$42,277,746	$7,398,008

(State's Exhibit 3, Iowa Racetrack Live Statistics).

10. In other terms, during the three year period from 1990 to 1993, Waterloo realized a 57 percent decrease in mutuel handle. Attendance dropped by 47 percent during the same period, even though Waterloo conducted 30 more performances in 1993 than it did in 1990. In the four year period from 1989 to 1993, Council Bluffs realized a 60 percent decrease in mutuel handle. In the same period, Dubuque realized an 89 percent decline in mutuel handle. As a result of these problems, Waterloo Greyhound Park

[4] "Mutuel handle" is the total amount gambled minus the winnings paid patrons.

filed for chapter 11 bankruptcy on December 16, 1993. (Exhibit 2, Chronology).

11. Prairie Meadows, the only horse racetrack in Iowa, saw similar declines in its mutuel handle shortly after it opened in 1989:

Year	Prairie Meadows
1989	$37,948,437
1990	$25,936,603
1991	$17,541,241
1992	$0[5]
1993	$5,362,700

(Exhibit 3, Statistics). Prairie Meadows filed for chapter 11 bankruptcy on November 27, 1991. (Exhibit 2, Chronology). At that time, there was $40 million of unpaid principle payments on the bonds used to build Prairie Meadows facility. *See Standfield v. Polk County*, 492 N.W.2d 648 (Iowa 1992).

Excursion gambling boats:

12. Gambling on excursion gambling boats was first authorized in 1989. 1989 Iowa Acts ch. 67. The 1989 legislation authorized qualified nonprofit corporations to apply for licenses to conduct wagering on gambling games. Iowa Code § 99F.5; 198 [sic] Iowa Acts ch. 67, § 5. The same 1989 legislation also authorized the licensing of the

[5] Prairie Meadows showed no mutuel handle in 1992 because it held no races during that year. (Exhibit 1, Ketterer affidavit).

operator of the excursion gambling boat, which may be a for-profit organization. *See Id.* The 1989 legislation further permits the qualified nonprofit corporation to enter into a management contract with a for-profit company to manage its gambling game operation. Iowa Code § 99F.7(2)(a); 1989 Iowa Acts ch. 67, § 7. Based on these provisions, the practice has been that all excursion gambling boat operators have been for-profit companies, and all have entered into management contracts with the nonprofit licensees to manage the operation of gambling games. (Exhibit 1, Ketterer Affidavit).

13. The 1989 legislation also added responsibilities to the State Racing Commission, which was renamed the Iowa Racing and Gaming Commission. 1989 Iowa Acts ch. 67, § 24. The Commission was also authorized to exercise full jurisdiction over and supervise all gambling operations authorized by chapter 99F. 1989 Iowa Acts ch. 67, § 4; Iowa Code § 99F.4. The Commission's duties under chapter 99F included investigating applicants for a license to determine who best served the interests of Iowa, authorizing the different types of casino games that could be offered, regulating the wagering structure providing for a maximum wager of $5 per wager and maximum loss of $200 per gambling excursion[6], determining the payouts from gambling games, define the duration of an excursion (which must be at least three hours), ensure that licensees recreate riverboats that resemble Iowa's riverboat history, and require licensees to utilize Iowa resources, goods, services, employees, and entertainers. 1989 Iowa Acts ch.

[6] Contrarily, there were no bet or loss limits on pari-mutuel wagering at racetracks. *See* Iowa Code 99D.11.

187, §§ 4, 7; 1989 Iowa Acts ch. 139 § 1; Iowa Code §§ 99F.4, 99F.7 (1989 Supp.).

14. The Commission began accepting applications for excursion gambling boat licensees after the implementation of the 1989 legislation. On March 8, 1990, the Commission granted the following four excursion gambling boat licenses:

> a) Dubuque Casino Belle Inc., d/b/a Dubuque Casino Belle in Dubuque. The Dubuque Casino Belle began operations on April 1, 1992.
>
> b) Steamboat Southeast, Inc., d/b/a Emerald Lady in Burlington, Fort Madison, and Keokuk. The Emerald Lady began operations on May 10, 1992.
>
> c) Steamboat Development Corp., d/b/a Diamond Lady in Bettendorf. The Diamond Lady began operations on April 1, 1992.
>
> d) Connelly Group, L.P., d/b/a President Casino in Davenport. The President began operations on April 1, 1992.

(Exhibit 2, Chronology).

15. The Commission later granted two additional licenses:

> e) On January 17, 1991, the Commission granted an excursion gambling boat license to the Mississippi Belle II in Clinton. The Mississippi Belle began operations on June 12, 1992.
>
> f) On July 2, 1992, the Commission granted an excursion gambling boat license to Missouri Riverboat Corp., d/b/a Sioux City Sue. The Sioux City Sue began operations on January 29, 1993.

(Exhibit 2, Chronology).

16. The excursion gambling boat licensees initially realized some success, but they soon experienced problems which limited profitability. When Iowa adopted its excursion gambling boat legislation, there was no casino gambling in other states. However, on February 7, 1990, Illinois adopted legislation authorizing riverboat gambling in its state. IL Legis. P.A. 86-1029 (Feb. 7, 1990). The Illinois statute authorized the grant of at least four licenses on the Mississippi River, which borders Iowa and Illinois. Ill. Rev. Stat. ch. 120, ¶ 2407(e). As a result, five of the six Iowa excursion gambling boat licensees soon saw direct competition from Illinois. Further, the Illinois statute did not set any limits on the amount that could be bet or loss. *Id.* at ¶ 2411(a)(3). Therefore, an Iowa patron who wanted to make a casino bet of more than $5, or wanted to risk more than $200, could drive across the river and gamble in Illinois.

17. Accordingly, some of the excursion gambling boat licensees moved their operations to other states that did not have bet or loss limits:

> a) In July of 1992, the Diamond Lady ceased operations in Iowa. The excursion gambling boat was transferred for use in another gaming jurisdiction.
>
> b) In July of 1992, the Emerald Lady ceased operations in Iowa. The excursion gambling boat was transferred for use in another gaming jurisdiction.

c) In March of 1993, the Dubuque Casino Belle ceased operations. The excursion gambling boat was transferred for use in another gaming jurisdiction.

(Exhibit 2, Chronology).

Further events leading to the 1994 legislation:

18. By 1993, the Iowa Racing and Gaming Commission was well-aware of the financial problems of the racetracks, and the competition issues facing the excursion gambling boats. Commission David Blair in particular, voiced his concern during public Commission meetings that the legislature was not taking any further action to save the industry in Iowa. (*See* Exhibit 4, Minutes).

19. In response to these concerns, the Commission prepared a supplement to its 1992 Annual Report to the Governor[7] documenting some of the problems. (Exhibit 5). This report referred to the pari-mutuel industry as "an industry in crisis," and noted the adverse effect on excursion gambling boats due to competition from other states and Indian casinos. (Exhibit 5, p. 16). Attachments to the report showed that all four racetracks showed a net loss in 1992. (Exhibit 5, attachments A, C). These attachments also show that attendance at the three excursion gambling boats had gone down. The Commission made no recommendations for legislation, stating that their position as regulators required them to stay neutral. However, the

[7] The Commission is required to submit an annual report to the governor, which could include any legislative changes recommended by the Commission. Iowa Code section 99D.21.

Commission closed its report by stating: "The future of these industries lies in the hands of the legislature and the people of Iowa." (Exhibit 5, p. 16).

20. Thereafter, on August 26, 1993, the Governor appointed Ed Stanek, Director of the Iowa Lottery, and Lorraine May, Chair of the Iowa Racing and Gaming Commission, to head a bi-partisan committee to recommend changes in Iowa's gambling laws. (Exhibit 6). The Committee also consisted of four legislators. The purpose of the Committee was to conduct a detailed study of the gaming industry and make recommendations to retain jobs, while protecting the integrity of gaming in the state. *Id.* The governor stated that there was a need for the Committee because there had been no consensus among legislators as to the steps that should be taken to remedy the problems in the racetrack and excursion gambling boat industry. *Id.*

21. The Gaming Study Committee published a substantial report of its findings and recommendations. (Exhibit 7). The Gaming Study Committee noted several purposes underlying the legislation contained in chapters 99D and 99F, including promoting economic development, increasing jobs, and generating tax revenue. (Exhibit 7, p. 28). Additionally, the Gaming Study Committee noted that the pari-mutuel statute has the additionally [sic] purpose of promoting development of agricultural industries, while the excursion gambling boat industry has the additional purpose of supporting river town development. (Exhibit 7, pp. 28, 30).

22. The Gaming Study Committee made the following recommendations regarding legislation to assist

racetracks and excursion gambling boats within the intent of the original statutes establishing chapters 99D and 99F:

1) To assist excursion gambling boats:

   a) Eliminate the $5 wager limit,

   b) Eliminate the $200 loss limit,

   c) Modify restrictions on the use of space on the boat, and

   d) Modify the cruising requirements.

2) To assist racetracks:

   a) Allow racetracks to operate slot machines, or

   b) Negotiate a revenue sharing agreement with the Indian tribes operating tribal casinos in Iowa.

(Exhibit 7, p. 35).

23. The Gaming Study Committee specifically noted that, if pari-mutuel racetracks are allowed to operate slot machines, they should pay a larger wagering tax than excursion gambling boats:

> Because the land-based casinos could function with a lower operating cost, the state should receive . . . 24% of adjusted gross revenues over three million.

(Exhibit pp. 35-36).

24. On March 31, 1994, the legislature approved amendments to chapters 99D and 99F. In particular, the legislature adopted three provisions consistent with the recommendations of the Gaming Study Committee. First,

the legislature assisted the racetracks by authorizing them to operate slot machines at their facilities. 1994 Iowa Acts ch. 1021, § 13; Iowa Code § 99F.4A. Second, the legislature assisted the excursion gambling boats by eliminating the wager and loss limits. 1994 Iowa Acts ch. 1021, § 19 (*see* Iowa Code § 99F.9(2) (1993)). Third, the legislature adopted a higher wagering tax rate for racetracks, albeit, not the same rate recommended by the Committee. *See* 1994 Iowa Acts ch. 1021, § 25; Iowa Code § 99F.11(1).

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IN THE IOWA DISTRICT COURT IN AND
FOR WARREN COUNTY

COALITION FOR A COMMON CENTS SOLUTION, THOMAS A. PHILLIPS, DANIEL W. FRIEBERG, KATHLEEN R. FRIEBERG, MICHAEL D. MOORE, MIKE STAUDACHER, RENE STAUDACHER, MARK CLARK, MARY CLARK, SUMNER OPSTAD, ELODIE OPSTAD, DEBORAH F. FRANKLIN, GENE L. FRANKLIN, and MARTIN P. MAHER,	:	NO. EQCV026737
Plaintiffs,	:	RULING AND ORDER
vs.	:	
STATE OF IOWA, THOMAS J. VILSACK, as Governor of the State of Iowa, MARY KRAMER, as President of the Iowa Senate, BRENT SIEGRIST, as Speaker of the Iowa House of Representatives, and TED STILWILL, as Director of the Iowa Department of Education,	:	
Defendants.	:	

This matter came on before the Court on August 23, 2002, on Defendants' Motion to Dismiss. Plaintiffs appeared by Attorney, Steven P. Wandro, and Defendants appeared by Assistant Attorney General, Christie J. Scase. Thereupon, the matter proceeded to hearing and the Court having reviewed the court file and having heard the

arguments of counsel makes the following Findings of Fact and Order.

FINDINGS OF FACT

Plaintiffs' petition was filed on April 5, 2002, seeking a declaratory judgment and injunctive relief. Plaintiffs' petition alleges that Chapter 422E of the Iowa Code is unconstitutional. Chapter 422E provides for a local option sales tax. If approved by a majority of voters within a county, the county may charge up to an additional 1 percent sales tax on all retail sales for a maximum of 10 years. Funds generated from the local option sales tax are set aside for school infrastructure within that county.

Plaintiffs allege that this local option sales tax has a disparate impact. They request, in addition to a declaratory judgment, an injunction to prohibit enforcement by the Defendants. Plaintiffs' petition further alleges that Iowa children have a fundamental right to an adequate education under the Iowa Constitution. In the alternative, Plaintiffs argue that this statute has no rational relationship to a legitimate state interest. They claim the impact of the tax is to treat school districts similarly situated in different ways based solely on geography and wealth, i.e. retail sales base. Plaintiffs claim this disparate treatment is unconstitutional.

Defendants' Motion to Dismiss was filed on June 3, 2002, and states that even if all of the allegations in Plaintiffs' petition are true, there is no basis for any right of recovery by Plaintiffs. Defendants specifically state that there is no Constitutional basis which provides a fundamental right to an education in Iowa. Defendants state Chapter 422E is designed to retain local control over the

decision to provide additional funds for school infrastructure. Defendants claim this is a rational basis for the statute which promotes a legitimate state interest.

In the alternative, Defendants allege that even if the action moves forward, the individual named Defendants, including Governor Thomas Vilsack, Mary Kramer as President of the Iowa Senate, Brent Siegrist as Speaker of the Iowa House of Representatives, and Ted Stilwill as Director of the Iowa Department of Education, must be dismissed because there is no claim which would provide a basis for any action against these individuals. Defendants state that Mary Kramer and Brent Siegrist have legislative immunity. In addition, Defendants allege that Governor Vilsack and Ted Stilwill have no specific statutory duty for enforcement of Chapter 422E.

Plaintiffs filed their resistance to the Defendants' Motion to Dismiss on July 9, 2002. Plaintiffs state that the standard required for a motion to dismiss prevents dismissal of the action on its merits. Plaintiffs agree that Mary Kramer and Brent Siegrist have legislative immunity and, therefore, should be dismissed from this action. Plaintiffs allege, however, that Defendants Vilsack and Stilwill should be left in the action in their official capacities.

CONCLUSIONS OF LAW

A motion to dismiss should be granted only if the petition shows no right of recovery under any state of facts. *Rieff v. Evans,* 630 N.W.2d 278, 284 (Iowa 2001); *quoted in Barnes v. State,* 611 N.W.2d 290, 292 (Iowa 2000). Such motion should not be liberally granted by the Court. *Id.* The issue is the right of access to the Court and

not the merits of the allegations. *Rieff* at page 284. Very little is required to survive a motion to dismiss. *Id.* Whether the Plaintiffs will be successful is not the issue before the Court on a motion to dismiss. What is before the Court is whether any statement of the facts will support Plaintiffs' petition. *Rieff* at page 292.

Plaintiffs' petition basically alleges that Chapter 422E creates an inequitable funding mechanism for education which violates the Iowa Constitution. Plaintiffs state that even if an adequate education is not a fundamental right under our state Constitution, Chapter 422E bears no rational relationship to any legitimate State interest. Defendants, on the other hand, argue that education is not a fundamental Constitutional right although it is important. Defendants also claim that local control constitutes a rational basis for the statute which accomplishes a legitimate Sate interest, *i.e.* funding for school infrastructure. If any conceivable basis exists for the statute which is rationally related to a legitimate State interest, the statute is constitutional. Defendants argue that even if the tax scheme is inequitable, the statute itself is constitutional.

Interestingly enough, both parties agree the Iowa Supreme Court has not specifically addressed whether education in Iowa is a constitutionally protected fundamental right. The parties have reached different conclusions regarding that question. The Iowa Supreme Court has stated a student has a due process right to an adequate education. *Exira Community Sch. Dist. v. State,* 512 N.W.2d 787, 796 (Iowa 1994). The Supreme Court did not, however, define what constitutes an adequate education in that case. *Id.*

The Defendants rely on a 1946 Iowa Supreme Court decision to support its position regarding educational funding. *Kleen v. Porter,* 23 N.W.2d 904 (Iowa 1946). That case held that educational funding statutes as then contained in Chapters 133 and 134 of the Iowa Code did not violate Article IX of the Iowa Constitution. In the same ruling, the Iowa Supreme Court overruled a contrary decision dating back to 1862. *Kleen* does not specifically address whether an education constitutes a fundamental right under the Iowa Constitution.

The difficulty for this Court is that even if Defendants are correct that there is no fundamental right to an education in this state, that does not resolve the question as to the rational basis for Chapter 422E. *See, Racing Ass'n of Cent. Iowa v. Fitzgerald,* 648 N.W.2d 555 (Iowa 2002). In that case the Iowa Supreme Court held a taxing mechanism which discriminated between casinos and racetracks was unconstitutional. *Id.* The Court did not address a fundamental right in that case. The Court, however, determined that there was no rational basis for the statute. The Court actually examined the purported basis for the statute. The Court concluded that a review of the alleged basis for the statute indicated that it was not rationally related to a legitimate State interest. *Id.* The Court stated, "Rational basis review of a taxing scheme is not tantamount to no judicial review." *Id.* at 8.

RULING AND ORDER

In the case before this Court, the statute does not set out the legislative basis for the local option sales tax. It would be pure speculation on the part of this Court to

make such a determination at this stage in the proceedings. In addition, the Iowa Supreme Court has not yet had the opportunity to address whether education is a constitutionally protected fundamental right. Applying the appropriate standard for a motion to dismiss, this Court cannot find that there is no version of the facts and/or applicable law which would support Plaintiffs' petition. That portion of Defendants' Motion to Dismiss relating to the merits of Plaintiffs' claim is denied for those reasons.

The remaining portion of Defendants' motion is addressed to the individual named Defendants. Plaintiffs acknowledge that Defendants Mary Kramer and Brent Siegrist have legislative immunity and the court, therefore, should dismiss them from this action. Plaintiffs reluctantly acknowledge that while Governor Vilsack and Director Stilwill may be permissive parties to this action, they are not necessary parties to this action. *See, Warden v. Pataki,* 35 F Supp.2d 354 (S.D.N.Y. 1999). The Court finds that the individual named Defendants are unnecessary to this action. Therefore, all individual Defendants are dismissed and Defendants' motion is granted as to defendants Kramer, Siegrist, Vilsack and Stilwill.

Dated this 8th day of October, 2002.

/s/ Martha Mertz
JUDGE, FIFTH JUDICIAL
DISTRICT OF IOWA

Copies to:
Counsel of record